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SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

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JEANNE HICKS, CLERK  
Shaunna Kelbaugh

BY: \_\_\_\_\_

11 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

12 IN AND FOR THE COUNTY OF YAVAPAI

13 STATE OF ARIZONA

14 Plaintiff,

15 vs.

16 STEVEN CARROLL DEMOCKER,

17 Defendant.

) No. P1300CR20081339

) Division 6

) **THE PENALTY OF DEATH IS**  
) **UNCONSTITUTIONAL**

) (Evidentiary Hearing and Oral  
) Argument Requested)

19  
20 Steven DeMocker faces the penalty of death if convicted in this case. For the  
21 reasons that follow, this penalty violates both the Arizona and Federal Constitutions.  
22  
23 Mr. DeMocker, by and through counsel, hereby requests that this Court hold that the  
24 death penalty violates both the Arizona and Federal Constitutions.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I. Introduction**  
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1 In June of 1972, the United States Supreme Court held unconstitutional all  
2 existing death penalty statutes. *Furman v. Georgia*, 408 U.S. 238 (1972). The Court's  
3 Per Curiam opinion stated simply that "the imposition and carrying out of the death  
4 penalty . . . constitute[s] cruel and unusual punishment in violation of the Eighth and  
5 Fourteenth Amendments." 408 U.S. at 239. The reasons underlying that opinion are set  
6 forth in five separate concurring opinions authored by the Court's majority. While the  
7 ruling invalidated all state death penalty laws then in existence, States were not  
8 foreclosed from passing new laws, and in the legislative sessions following closely  
9 afterwards at least 35 States passed new laws. Arizona was one of those States. For  
10 now more than 35 years, courts have grappled with a numbing array of questions about  
11 the constitutionality of these laws. State and federal legislative bodies have also  
12 continued to adopt, amend, augment and refine death penalty laws. An uncountable  
13 number of statutory provisions have been invalidated, and many of them replaced by  
14 other laws. Over 7400 men and women have been sentenced to death. Some have been  
15 reversed; some have been resentenced; some have been exonerated; and some have been  
16 executed. And through it all, the question lingers whether any law allowing the penalty  
17 of death is consistent with our Constitutions.

22 We submit that it is eminently foreseeable that the day will come when courts in  
23 this State and nationally will hold that no death penalty law is sustainable. Whether that  
24 day comes during our lifetimes or not, it is also evident that Arizona's laws are deficient  
25 today. Arizona's death penalty laws invite the very arbitrary, unpredictable, and  
26 discriminatory application that led Justices Douglas, Stewart and White to join in  
27

1 invalidating State laws in 1972. Our laws suffer from the same defects that led Justice  
2 Blackmun to abandon the possibility that any law could survive scrutiny and to declare  
3 “I shall no longer tinker with the machinery of death.” *Callins v. Collins*, 510 U.S.  
4 1141, 1145 (1994) (dissent from denial of certiorari). Our laws are among the failed  
5 efforts that ultimately caused Justice Powell to acknowledge that “capital punishment  
6 should be abolished” and that he had erred in too many cases to count in trying to  
7 fashion a law that would be constitutional. Lewis F. Powell, Jr. by John C. Jeffries, at  
8 451 (1994 authorized biography of Justice Powell).

11 Even if Arizona’s laws could somehow be deemed constitutional, they are  
12 unconstitutional if applied to Steven DeMocker. In the ensuing section of this  
13 Memorandum we will identify the reasons that support our conclusion that the death  
14 penalty is on its face unconstitutional. We will then address the flaws in the Arizona  
15 law as applied. We urge this Court not to postpone ruling on these important  
16 constitutional questions. This case should not proceed to trial as a capital case. Mr.  
17 DeMocker should not be found guilty beyond a reasonable doubt by any jury, but he  
18 deserves a trial before a jury that from the beginning is free from the heavy baggage of  
19 the death penalty.

## 22 **II. Why the Arizona Death Penalty System is Unconstitutional.**

### 23 **A. The mandate of “evolving standards of decency in a maturing 24 society.”**

25 “The proscription of cruel and unusual punishments ‘is not fastened to the  
26 obsolete, but may acquire meaning as public opinion becomes enlightened by a humane  
27 justice.’” *Furman v. Georgia*, 408 U.S. at 242 (J. Douglas, concurring) (citing *Weems*  
28

1 v. *United States*, 217 U.S. 349, 378 (1910)); *see also* *Gregg v. Georgia*, 428 U.S. 153,  
2 171 (1976) (also citing *Weems*). The Eighth Amendment “must draw its meaning from  
3 the evolving standards of decency that mark the progress of a maturing society.” *Id.*  
4 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Any assessment of contemporary  
5 values concerning the infliction of a challenged sanction requires “that we look to  
6 objective indicia that reflect the public attitude toward a given sanction.” *Gregg*, 428  
7 U.S. at 173.

8  
9  
10 **i. Public support for capital punishment is waning**

11 A strong indicator of support for the death penalty lies in society’s general  
12 acceptance of laws providing for capital punishment. The Court in *Gregg* found the  
13 “most marked indication of society’s endorsement of the death penalty” to be that the  
14 legislatures of thirty-five states enacted new statutes to provide for the death penalty  
15 after *Furman* was decided.<sup>1</sup> *Id.* at 179-80. The Court further stated that in determining  
16 contemporary standards of decency, “legislative judgment weighs heavily[.]” *Gregg*,  
17 428 U.S. at 175.

18  
19 The nation is now witnessing a dramatic undermining of legislative support for  
20 capital punishment. This year, New Mexico became the fifteenth state to abolish the  
21 death penalty. *See* The Death Penalty Information Center, The Death Penalty in 2009:  
22 Year End Report, <http://www.deathpenaltyinfo.org/reports> (last visited Jan. 25, 2010).  
23 Of the thirty-five remaining states with laws permitting the death penalty, eleven  
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26  
27 <sup>1</sup> The Court also found the jury to be a significant and reliable objective index of  
28 contemporary standards of decency. *Gregg*, 428 U.S. at 180. As discussed below, a  
death-qualified jury is hardly a reliable and objective cross-section of society.

1 considered legislative proposals to repeal the death penalty in 2009. *Id.* The  
2 Connecticut legislature voted to abolish the death penalty but the law was vetoed by the  
3 governor. *Id.* Legislation abolishing the death penalty passed one house of the  
4 legislature in both Colorado and Montana and came close to passage in Maryland. *Id.*  
5 Legislatures nationwide are reconsidering capital punishment.

7       A shift away from the death penalty can also be seen in the decrease in  
8 executions across the United States. Executions have been declining from a peak of  
9 ninety-eight in 1999 to fifty-two in 2009. The Death Penalty Information Center, Death  
10 Penalty Fact Sheet, <http://www.deathpenaltyinfo.org> (last visited Jan. 25, 2010). The  
11 number of death sentences has dropped 63% since reaching a high of three hundred  
12 twenty-eight in 1994. The Death Penalty Information Center, The Death Penalty in  
13 2009: Year End Report, *supra*. 2009 was the seventh straight year of decline in death  
14 sentences. *Id.* Of the thirty-five states authorizing the death penalty, only eleven  
15 actually carried out executions in 2009 – 87% of these were in the south and over half in  
16 Texas alone. *Id.*

17       Public opinion polls show that public confidence in the death penalty is waning.  
18 Support for the death penalty reached a high of 80% in 1994, but has since declined by  
19 15%. Gallup, Death Penalty Poll, <http://www.gallup.com/poll/1606/death-penalty.aspx>  
20 (last visited Jan. 25, 2010). Opposition to the death penalty has risen from 16% in 1994  
21 to 31% in 2009. *Id.* For the first time since the Gallup Poll began asking in 1985, more  
22 people stated that life imprisonment was a better penalty for murder than the death  
23 penalty. *Id.* In fact, nearly 40% of the public believes that they would be disqualified  
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1 from serving on the jury in a death penalty case because they would be opposed to it in  
2 all cases. The Death Penalty Information Center, A Crisis of Confidence: Americans'  
3 Doubts About the Death Penalty, at 2, <http://www.deathpenaltyinfo.org/reports> (last  
4 visited Jan. 25, 2010). Furthermore, although deterrence is often cited as a rationale in  
5 support of the death penalty, as of 2006, 64% of the public does not believe that the  
6 death penalty actually acts as a deterrent to murder. *Id.*

8  
9 **ii. The international community largely rejects the death penalty**

10 The erosion of public support for the death penalty is not limited to the United  
11 States. The international community has overwhelmingly voiced its mounting  
12 opposition to capital punishment. Although only sixteen countries had abolished the  
13 death penalty in 1977, by 2009, ninety-five countries had abolished the death penalty  
14 for all crimes, another nine countries had abolished the death penalty for all but  
15 extraordinary crimes such as those committed under military law, and another thirty-  
16 five were abolitionist in practice meaning that they had not carried out an execution for  
17 ten or more years and had a policy in place or established practiced of not carrying out  
18 executions. Amnesty International, Abolitionist and Retentionist Countries,  
19 <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last  
20 visited Jan. 25, 2010). Only fifty-eight countries retaining the death penalty remain, and  
21 of those less than half actually carried out an execution in 2008. *Id.*<sup>2</sup> In terms of  
22 numbers alone, retentionist countries are in the clear minority.

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27 <sup>2</sup> The number of retentionist countries continues to decrease. On January 14,  
28 2010, the President of Mongolia – one of the fifty-eight remaining retentionist countries

1       Leading international bodies are another key source of international opposition to  
2 the death penalty. Since 1994, a commitment to the abolition of the death penalty has  
3 been mandatory for membership in the Council of Europe and the European Union.  
4  
5 Mark Warren, *Death, Dissent, and Diplomacy: The U.S. Death Penalty as an Obstacle*  
6 *to Foreign Relations*, 13 Wm. & Mary Bill Rts. J. 309, 319 (2004). In 2001, the United  
7 States lost its seat on the UN Commission on Human Rights for the first time since the  
8 commission's formation in 1947 – in part because of continued United States support  
9 for the death penalty. *Id.* at 320-21. In 2002, Protocol Number 13 to the Convention  
10 for the Protection of Human Rights and Fundamental Freedom, mandating the abolition  
11 of the death penalty in all circumstances, was adopted. William A. Schabas,  
12 *International Law, Politics, Diplomacy, and the Abolition of the Death Penalty*, 13 Wm.  
13 & Mary Bill Rts. J. 417, 425 (2004). On December 18, 2007, the United Nations  
14 General Assembly by an overwhelming majority adopted resolution 62/149 calling for a  
15 worldwide moratorium on executions. Amnesty International, Moratorium on  
16 Executions, <http://www.amnesty.org/en/death-penalty/international-law/moratorium>  
17 (last visited Jan. 25, 2010). On December 15, 2009, the top United Nations human  
18 rights official called for the universal abolition of the death penalty. High  
19 Commissioner for Human Rights, Navi Pillay, cited numerous reasons for this position,  
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25 – vowed to pardon all on death row and called for a moratorium on executions stating  
26 “The majority of the world's countries have chosen to abolish the death penalty. We  
27 should follow this path.” News and Developments 2010: International, Death Penalty  
28 Information Center, <http://www.deathpenaltyinfo.org/news/past/35/2010>. Mongolia  
recognizes what the United States, thus far, has not.

1 including "the fundamental nature of the right to life; the unacceptable risk of executing  
2 innocent people by mistake; the absences of proof that the death penalty serves as a  
3 deterrent; and...the inappropriately vengeful character of the sentence." UN News  
4 Centre, UN human rights chief calls for universal abolition of the death penalty,  
5 <http://www.un.org/apps/news/story.asp?NewsID=33259&Cr=pillay&Cr1=> (last visited  
6 Jan. 25, 2010).

7  
8         The United States now stands alone among its peers in its continued support and  
9 use of the death penalty. Europe and Central Asia are now virtually death penalty free  
10 zones with the exception of Belarus. And in the Americas, the United States is the only  
11 country that consistently carries out executions. Amnesty International USA, Death  
12 Penalty Statistics, [http://www.amnestyusa.org/death-penalty/international-death-](http://www.amnestyusa.org/death-penalty/international-death-penalty/death-penalty-statistics/page.do?id=1011348)  
13 [penalty/death-penalty-statistics/page.do?id=1011348](http://www.amnestyusa.org/death-penalty/international-death-penalty/death-penalty-statistics/page.do?id=1011348) (last visited Jan. 25, 2010). As a  
14 proponent of the death penalty, the United States finds itself among unlikely company.  
15 In 2008, 95% of executions worldwide were carried out in only six countries: China,  
16 Iran, Saudi Arabia, the United States, Pakistan, and Iraq. The Death Penalty  
17 Information Center, Death Penalty: An International Perspective,  
18 <http://www.deathpenaltyinfo.org/death-penalty-international-perspective> (last visited  
19 Jan. 25, 2010). This is not the group of nations with whom the United States would  
20 most like to be associated.

21  
22         The continued support of the death penalty is harming United States interests  
23 both abroad and at home. The United States is finding it more and more difficult to  
24 obtain the extradition of accused criminals to stand trial in the United States. Canada,  
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1 Germany, Mexico, France, Spain, South Africa, Italy, and the United Kingdom are  
2 denying extradition to the United States unless assurances against seeking the death  
3 penalty are given. John Paul Truskett, *The Death Penalty, International Law, and*  
4 *Human Rights*, 11 Tulsa J. Comp. & Int'l L. 557, 572 (2004). In addition, other  
5 countries are beginning to challenge the United States on the treatment of foreign  
6 nationals facing the death penalty. The International Court of Justice has ruled on  
7 several occasions that the United States violated the Vienna Convention by executing  
8 foreign nationals without notifying them of their right to contact their consulate for  
9 assistance in preparing a defense. Dorean Marguerite Koenig, *International Reaction to*  
10 *Death Penalty Practices in the United States*, 28-Sum Human Rights 14, 15 (2001);  
11 Russell G. Murphy, *Executing the Death Penalty: International Law Influences on*  
12 *United States Supreme Court Decision-Making in Capital Punishment Cases*, 32  
13 Suffolk Transnat'l L. Rev. 599, 623-24 (2008).

17 United States Ambassadors have argued that capital punishment is hurting the  
18 image of the United States in Europe. Stephen B. Bright, *Will the Death Penalty*  
19 *Remain Alive in the Twenty-First Century: International Norms, Discrimination,*  
20 *Arbitrariness, and the Risk of Executing the Innocent*, 2001 Wis. L. Rev. 1, 4 (2001).  
21 The United States persistence in maintaining the death penalty is also compromising its  
22 ability to be a leader on human rights issues. Truskett, *supra*, at 601. Two former high  
23 level diplomats recently stated about the United States – “[f]or a country that aspires to  
24 be a world leader on human rights, the death penalty has become our Achilles heel.”  
25 Warren, *supra*, at 315. The United States stance on the death penalty provides  
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ammunition for countries with egregious human rights records to use against it.

Truskett, *supra*, at 601. For example, China, a country known for its flagrant human rights abuses, brings up the record of the United States whenever it is confronted with protests over its own human rights practices. *Id.*

**iii. The American Law Institute withdrew its Model Penal Code section on capital punishment**

Scholars have also withdrawn support for the death penalty. The American Law Institute (“ALI”) is an independent organization within the United States, made up of four thousand lawyers, judges, and law professors, that produces scholarly work to clarify, modernize, and otherwise improve the law. American Law Institute, Creation of the Institute, <http://www.ali.org/index.cfm?fuseaction=about.overview> (last visited Jan. 25, 2010). The ALI first created the intellectual framework for capital punishment as Model Penal Code section 210.6. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. Times, Jan. 4, 2010.

The United States Supreme Court has cited the ALI’s Model Penal Code sections governing capital proceedings to support its findings that it is possible to create a constitutional death penalty scheme. The *Gregg* Court cites to the Model Penal Code section 210.6 as support for its holding that bifurcating the guilt and sentencing proceedings will sufficiently ensure that a jury is not prejudiced by evidence irrelevant to the guilt phase, but relevant to the penalty. *Gregg*, 428 U.S. at 191-92. The Court again cites the example of the Model Penal Code for the proposition that it is possible to

1 formulate standards to guide a capital jury's sentencing deliberations and reduce the  
2 likelihood that the sentence will be arbitrary or capricious. *Id.* at 193-95.

3  
4 On October 23, 2009, the ALI Council overwhelmingly approved the following  
5 resolution:

6 For reasons stated in Part V of the Council's report to the membership,  
7 the Institute withdraws Section 210.6 of the Model Penal Code in light  
8 of the current intractable institutional and structural obstacles to  
9 ensuring a minimally adequate system for administering capital  
punishment.

10 The American Law Institute, Message From ALI Director Lance Liebman,  
11 [http://www.ali.org/\\_news/10232009.htm](http://www.ali.org/_news/10232009.htm) (last visited Jan. 25, 2010).

12  
13 The importance of this decision by the members of the ALI cannot be overstated.  
14 This resolution was not passed by a liberal anti-death penalty group, but rather by a  
15 mainstream group of prominent lawyers, attorneys, and law professors. The withdrawal  
16 of the entire Model Penal Code dealing with capital punishment is a crucial  
17 development in death penalty discourse because – as Franklin E. Zimring, a law  
18 professor at UC Berkeley, states – the ALI was “the only intellectually respectable  
19 support for the death penalty system in the United States.” Adam Liptak, *Group Gives*  
20 *Up Death Penalty Work*, N.Y. Times, Jan. 4, 2010. The concept that, indeed, standards  
21 do “evolve” in a “maturing society” can find no better evidence than in this  
22 development.  
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25 As if to offer a succinct summary of these signposts for this Court's convenience,  
26 an article in Sunday's *New York Times* captures in a paragraph the evidence that is  
27 becoming increasingly obvious to all who care to look at the death penalty in America:  
28

1 Statistics from the Death Penalty Information Center show that the  
2 death penalty in America is dying. In 2009, the number of death  
3 sentences dropped for the seventh consecutive year; it's now the  
4 lowest since the Supreme Court reinstated the death penalty in 1976.  
5 Eleven states considered abolishing the death penalty last year,  
6 citing high costs and lack of measurable benefits. New Mexico just  
7 became the 15th state to abolish it. A recent study from Duke  
8 University concluded that North Carolina could save almost \$11  
9 million annually by doing away with capital punishment. And the  
10 prestigious American Law Institute, which devised the framework  
11 for the modern system of capital punishment, recently abandoned the  
12 whole project "in light of the current intractable institutional and  
13 structural obstacles to ensuring a minimally adequate system for  
14 administering capital punishment.

15 Dahlia Lithwick, *Death and Texas*, N.Y. Times, Feb 14, 2010.

16 **iv. Deterrence: 35 years of additional evidence that the death**  
17 **penalty serves no legitimate purpose of law enforcement**

18 Deterrence is often cited as a critical justification for the death penalty. The  
19 Supreme Court in *Gregg* noted that there was "no convincing empirical evidence either  
20 supporting or refuting" the view that capital punishment deters crime, but still went on  
21 to "safely" assume that the death penalty is undoubtedly a significant deterrent in many  
22 murders, especially carefully contemplated murders such as murder for hire. *Gregg*,  
23 428 U.S. at 185-86. Thanks to the efforts of criminologists and other researchers, there  
24 is now a substantial body of work demonstrating that, contrary to this assumption, the  
25 death penalty does not deter homicides.

26 Empirical studies comparing death penalty jurisdictions with jurisdictions that do  
27 not provide for the death penalty show no significant difference between the two.

28 Comparing the trends in homicide rates over time between the United States and  
Canada reveals that the rises and falls in both countries are very similar. John J.

1 Donohue & Justin Wolfers, *The Ethics and Empirics of Capital Punishment: Uses and*  
2 *Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791, 799-  
3 800 (2005). Both countries employed the death penalty in the 1950s and the homicide  
4 rates were similar. *Id.* Between 1961 and 1967 Canada enacted a series of restrictions  
5 on the death penalty which led to a complete cessation of executions beginning in 1962.  
6 *Id.* Nonetheless, both countries experienced a sharp rise in homicides after the 1972  
7 moratorium on the death penalty resulting from *Furman*. *Id.* After the death penalty  
8 was reinstated in the United States, the homicide rate remained high in the United States  
9 for the next two decades while the rate fell in Canada. *Id.* Only over the last decade  
10 have homicide rates begun to fall in the United States as well. *Id.*

13  
14 Likewise, a comparison of homicide rates between death penalty states and non-  
15 death penalty states within the United States also shows similar results. Comparing the  
16 six states that did not have the death penalty at any point between 1960 and 2000 with  
17 states that had the death penalty during part or most of those years shows a close co-  
18 movement of homicide rates in these two groups of states. *Id.* at 800-01. Both groups  
19 experienced higher homicide rates during the death penalty moratorium than the  
20 proceeding decade and saw the rate continue to increase for the subsequent decade and  
21 fall only in the late 1990s. *Id.* at 801. These numbers clearly show that something other  
22 than capital punishment is affecting homicide rates in the United States.

23  
24  
25 Perhaps most convincing is the collective opinion of experts in this area. When  
26 asked, 88.2% of the country's leading criminologists reported that the death penalty is  
27 not a deterrent to homicides. Michael L. Radelet, *Do Executions Lower Homicide*

1 *Rates? The Views of Leading Criminologists*, 99 J. Crim. L. & Criminology 489,  
2 501(2009). Less than 10% of these experts believe that the deterrence effect of the  
3 death penalty is stronger than that of long-term imprisonment. *Id.* at 503.  
4

5 Despite the almost complete unanimity among leading experts in criminology  
6 that the death penalty does not deter homicides, there are still articles reporting that the  
7 death penalty has a deterrent effect. Studies are worthless if not founded on solid theory  
8 and scientific principles and the studies reporting deterrent effects suffer from a number  
9 of flaws. John Donohue of Yale Law School and Justin Wolfers of The Wharton  
10 School at the University of Pennsylvania analyzed many of the most prominent studies  
11 citing the deterrent effect of the death penalty and found significant errors in each of  
12 these studies. *Donohue, supra*, at 827-30. Donohue and Wolfers took these errors into  
13 account and adjusted the data in each study accordingly. Their results led them to  
14 conclude that the death penalty does not have a deterrent effect on homicide. *Donohue,*  
15 *supra*, at 827-30. Other recent studies have reached the same conclusion. Tomislav V.  
16 Kovandzic, *Does the Death Penalty Save Live? New Evidence from State Panel Data,*  
17 *1977 – 2006*, 8 Criminology & Pub. Pol’y 803 (2009) ; Radelet, *supra*, at 493-99  
18 (reporting flaws in several prominent studies finding deterrence).  
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22 Our collective common sense compels this further conclusion: the death penalty  
23 has never and will never deter the class of homicide addressed in the State’s indictment  
24 in this case. One can hardly imagine Carol Kennedy’s killer weighing the risk of the  
25 death penalty before, during or after this act. And this is the case in virtually all  
26 homicides that lack an obvious motive. No robbery. No sexual assault. If the day ever  
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comes when we unravel what really happened, there may be time then to ask whether the contemplation of the death penalty might have or should have deterred the perpetrator. The State's case today, however, does not admit of a reasoned deterrence-based defense of the death penalty.

**B. The Failure of Arizona to Narrow: The Lost Search for "the worst of the worst."**

Our observations on deterrence lead naturally to the question whether the Arizona statute has swept too broadly to survive Constitutional scrutiny. Death penalty statutes must narrow the class of death eligible defendants and also guide the sentencer's discretion to ensure an individualized determination regarding the propriety of the death sentence. *See Gregg v. Georgia*, 428 U.S. at 189. "A capital sentencing scheme must, in short, provide a meaningful basis for distinguishing the few cases in which the [the death penalty] is imposed from the many cases which it is not." *Id.* (internal quotations omitted). *See also Zant v. Stephens*, 462 U.S. 862, 877-78, 103 S Ct. 2733, 2642-43 (1983) (aggravating factors must narrow the class of persons eligible for the death penalty and reasonably justify imposition of a more severe sentence compared to others found guilty of murder). Arizona courts have repeatedly recognized this, and our State Supreme Court has often said that the death penalty should not be imposed in every capital murder case but, rather, it should be reserved for cases in which either the manner of the commission of the offense or the background of the defendant places the crime "above the norm of first-degree murders." *State v. Hoskins*, 199 Ariz. 127, 163 ¶ 169, 14 P.3d 997, 1033 ¶ 169 (2000) (dissent) (quoting *State v. Blazak*, 131 Ariz. 598, 604, 643 P.2d 694, 700 (1982)); *State v. Zaragoza*, 135 Ariz. 63, 68-69, 659 P.2d 22, 27-28 (1983) ("either the circumstances of the killing are so shocking ... or the background of the murderer sets him apart from the usual first degree murderer."); *see also State v. Smith*, 146 Ariz. 491, 505, 707 P.2d 289, 303

1 (1985). To pass constitutional muster, sentencing schemes must narrow the class of  
2 persons to those for whom the sentence is justified. *See Jones*, 197 Ariz. 209, 309 ¶ 52,  
3 4 (2000). To date, the Arizona Court's majority has found that the law does adequately  
4 narrow. A closer look, we submit, calls that conclusion into serious question.

5  
6 We submit the best test of the claim that the death penalty in Arizona is subject to  
7 arbitrary application would be to look at prosecutorial charging decisions. Members of  
8 the Attorney General's Capital Case Commission thought a study of homicide charging  
9 decisions should be completed. In 2001 and 2002, hopes were high that such a study  
10 could be funded and managed by social science professionals at Arizona State  
11 University. Sadly, that study has never been launched. Indeed, virtually nothing has  
12 been done to follow up on any recommendation in the Commission's Report. Neither  
13 the Attorney General, the academic community, the judicial branch, the legislative  
14 branch, nor the defense community has undertaken this work. The reasons for this  
15 failure of scholarship and public policy would make for their own study, and the  
16 consequences of having done nothing for eight years now deserve to be chronicled. In  
17 the absence of any study, Mr. DeMocker's counsel have undertaken our own study of  
18 charging decisions.  
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22 There was neither time nor resources to study every decision statewide, but we  
23 believed that meaningful data could be gleaned from a more narrowly focused inquiry.  
24 With that in mind, counsel undertook to research the capital charging practices in  
25 Arizona by reviewing homicide cases charged in Yavapai, Maricopa and Coconino  
26 counties. The field work was done by a recent law school graduate with the advice of  
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1 the ASU professor who had hoped years ago to be involved in this type of study herself.  
2 The investment of time in this project we can now see was well worth the endeavor.  
3 Because there is no statewide database, the work had to be accomplished by on-site  
4 examination of court files. The fact that there is no repository of data on homicide  
5 charging decisions is itself an indictment of the idea that Arizona's is a rational system,  
6 and it can surprise no one that our review leads to the inevitable conclusion that the  
7 Arizona death penalty statute fails to provide the constitutionally required narrowing of  
8 death penalty cases to "the worst of the worst." This research reveals that capital case  
9 charging is neither uniform nor consistent either between or within Arizona counties  
10 and fails to constitutionally limit possible death eligible cases.

13 Here is what we found.

14  
15 **i. Yavapai County**

16 Yavapai County constitutes almost 3% of Arizona's population, 7% of the land  
17 area, and 1% of the murder rate.<sup>3</sup> Between January 2002 and September 2009, there  
18 were 80 homicides that led to some criminal charge in Yavapai County. We reviewed  
19 all 80. Thirty (38%) of the homicides in Yavapai County during this period were charged  
20 as first degree murder, 26% were charged as second degree murder and 36% were  
21 charged as manslaughter. A Notice of Intent to Seek the Death Penalty was filed by the  
22 Yavapai County Attorney's Office in nine cases--34% of all first degree murder cases in  
23

24  
25  
26 <sup>3</sup> All numbers used in murder-rate calculations are taken from the Department of Public Safety's annual Crime in  
27 Arizona Reports, which defines murder as the willful (non-negligent) killing of another. Traffic fatalities and  
28 negligent manslaughters are not included in the number of murders reported.  
[http://www.azdps.gov/About/Reports/Crime\\_In\\_Arizona/](http://www.azdps.gov/About/Reports/Crime_In_Arizona/)

1 this seven and a half year time frame. In the same time period, 1 death sentence was  
2 handed down in Yavapai County.<sup>4</sup>

3  
4 The likelihood of the death penalty being sought in a first degree murder case in  
5 Yavapai County varies wildly from year to year. For example, between 2002 and 2004  
6 not a single death penalty notice was filed. This is true even though seven first degree  
7 murder cases were charged during these years. In 2005, out of six first degree murder  
8 cases, four death penalty notices were filed. In the following three years between 2006  
9 and 2008, five death penalty notices were filed from the thirteen first degree murder  
10 cases charged. No logic explains these wide variances in death penalty charging  
11 decisions.  
12

13  
14 A statute that permits two-thirds of first degree murder charges to be noticed as  
15 death penalty cases obviously cannot be said to be performing the constitutionally  
16 required narrowing function. That the death penalty is to be reserved for the “worst-of-  
17 the-worst” means that it cannot be the “norm” and certainly not more than the  
18 majority of first degree murder cases in any relevant time period. Yet, this is exactly  
19 what the Arizona statutory scheme permitted in Yavapai County.  
20

21 We also looked at charging decisions in cases that might be close to the  
22 circumstances alleged in Mr. DeMocker’s indictment. Cases of what might for general  
23 descriptive purposes be labeled as “inter-spousal homicide” are charged inconsistently  
24 in Yavapai County as well. (We included here people who were married, previously  
25 married, or cohabiting in an apparently marital manner.) We found that eight (10%) of  
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27  
28 <sup>4</sup> The defendant was charged in 2001.

1 the homicide cases in Yavapai County involve inter-spousal homicide. Cases involving  
2 inter-spousal violence between January 2002 and September 2009 were charged as first  
3 degree murder cases 5 times (62.5%); as manslaughter twice; and as second degree  
4 murder once. Of those eight first degree murder cases, the death penalty was sought  
5 twice. One might then ask whether the facts of the cases might explain the varying  
6 charging decisions. They do not, and this is particularly true when one asks why the  
7 death penalty was sought or not sought. For instance, in one case where first degree  
8 murder was charged, the defendant struck his wife, whom he discovered was having an  
9 affair, numerous times in the head with a three-pound steel pipe and killed her. She  
10 died from seven blunt force trauma wounds to the head. The death penalty was not  
11 sought.<sup>5</sup>

## 12 **ii. Maricopa County**

13 One might argue that the sample of cases in Yavapai County is too small to  
14 admit of conclusive statistical proof. While we submit that the freakishness of the death  
15 penalty is apparent in the 80 cases we examined, a larger statistical base can be found in  
16 Maricopa County. The County constitutes 61% of Arizona's population, 8% of the land  
17 area, and 70% of the State's charged homicides. There were 1,635 homicides charged in  
18 Maricopa County between January 1, 2002 and June 30, 2009. Given this volume we  
19 developed a plan to evaluate a representative sample. To that end, after consulting with  
20 those possessing more social scientific research skills that are possessed by the members  
21 of this defense team, we decided to look at 10% of each category of cases (75 first

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22 <sup>5</sup> All facts taken from the Pre-Sentence report written by the Senior Adult Probation Officer.

1 degree murder cases, 50 second degree murder cases and 38 manslaughter cases).

2 During this timeframe, almost half of the homicides in Maricopa County were charged  
3 as first degree murder, 30% were charged as second degree murder and 23% were  
4 charged as manslaughter. In the random sample of 10% of these cases, the Maricopa  
5 County Attorney's Office filed a death penalty notice in 36% of first degree murder  
6 cases.  
7

8 The likelihood of the death penalty being sought in a first degree murder case in  
9 Maricopa County, like Yavapai County, varies wildly from year to year. The County  
10 Attorney's Office sought the death penalty in 29% of all first degree murder cases in  
11 2004 and 28% in 2005. According to a press release from the Maricopa County  
12 Attorney's Office's website, 46 death penalty notices were filed in 2006, constituting a  
13 death notice in 46.9% of first degree murder cases. 32 notices were filed in both 2007  
14 and 2008, with a rate of 31.6% in those years.<sup>6</sup> Thus, we can see that in Maricopa  
15 County, the percentage of death penalty notices ranged from between about a quarter to  
16 almost half of the first degree murder cases.  
17

18 Death penalty charging practices in Maricopa County, like in Yavapai County,  
19 demonstrate that the Arizona death penalty scheme cannot possibly be performing the  
20 constitutionally required narrowing function. No system that can result in almost half of  
21 all first degree murder cases being treated as death penalty cases can be deemed  
22 consistent with a "worst of the worst" constitutional mandate. Plainly, the statute is  
23 failing entirely to "provide a meaningful basis for distinguishing the few cases in which  
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<sup>6</sup> Information taken from a press release posted on the Maricopa County Attorney's Website, date 9/17/09.  
28 <http://www.maricopacountyattorney.org/newsroom/index.html>

1 the [the death penalty] is imposed from the many cases which it is not.” *See Gregg v.*  
2 *Georgia*, 428 U.S. at 189. (internal quotations omitted). *See also Zant v. Stephens*, 462  
3 U.S. 862, 877-78, 103 S Ct. 2733, 2642-43 (1983) (aggravating factors must narrow the  
4 class of persons eligible for the death penalty and reasonably justify imposition of a  
5 more sever sentence compared to others found guilty of murder).  
6

7 Cases involving inter-spousal homicide are also treated inconsistently in  
8 Maricopa County. Of the cases reviewed, inter-spousal homicide was charged as first  
9 degree murder 46.6% of the time and the death penalty was sought in 57% of those  
10 cases. Of the 10% of all homicide cases reviewed, inter-spousal homicides were  
11 charged as second degree murder 33% of the time in Maricopa County and as  
12 manslaughter 20% of the time. The facts of these cases do not provide the key to  
13 distinguishing between first and second degree charging. In one of the cases, charged as  
14 second degree murder, a boyfriend of a victim strangled the victim who was allegedly  
15 going to call the police on her boyfriend who was on parole.<sup>7</sup> In another case, a  
16 defendant killed his pregnant girlfriend by pushing her into a coffee table, where she  
17 died on impact, and then attempted to light the victim on fire and fled to Mexico. He  
18 was also charged with second degree murder.<sup>8</sup>  
19  
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### 22 **iii. Coconino County**

23 We also wanted, at least at this stage with the time available, to look at one other  
24 county that might be seen as potentially comparable to Yavapai County. Our  
25 investigating colleague found the Clerk’s Office personnel in Flagstaff to be open to  
26

27 <sup>7</sup> CR 2006 112867. Maricopa County 2006

28 <sup>8</sup> CR 2008-007346. Maricopa County 2008

1 helping and we elected to send her there. Coconino County accounts for about 2% of  
2 Arizona's population, 16% of the land area, and less than 1% of the murder rate. There  
3 were twenty-five homicide cases charged in Coconino County from January 2002  
4 through June 2009. All of these homicides were reviewed. Twenty (80%) of the  
5 homicide cases during this time frame in Coconino were charged as first degree murder,  
6 four (16%) were charged as second degree murder, and one were charged as  
7 manslaughter. Our first observation—obvious from these numbers—is that homicide  
8 charging is less than one-third of the total in neighboring Yavapai. Over the same time  
9 period, as we noted above, 80 homicide cases were charged in Yavapai County.  
10 Population and any other apparent demographics fail to account for this disparity. Some  
11 might pass this off as a mere anomaly, but when considering whether capital  
12 punishment serves any usual societal purpose—deterrence or otherwise—it is hard to  
13 ignore such wide swings between regions otherwise so apparently similar.

14  
15 Only two of the cases during this time period were “inter-spousal homicides” and  
16 both were charged with first degree murder and the death penalty was sought in one of  
17 them. Again, it causes us pause that there were eight such cases in Yavapai and only  
18 two here. One must wonder whether there is some rational basis for arguing that the  
19 Carol Kennedy homicide would not have been a death penalty case if the death had  
20 occurred a few miles north of Williamson Valley. One final statistic is worth noting  
21 here. The County Attorney's Office filed a Notice of Intent to Seek the Death Penalty  
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1 in 20% of all first degree murder cases.<sup>9</sup> This percentage is significantly lower than the  
2 lowest numbers from either Yavapai County or Maricopa County. Four cases were  
3 charged as capital in more than seven years since *Ring*.  
4

#### 5 iv. Federal System

6 These numbers and disparate percentages have caused us to think it helpful to  
7 pause to look at death penalty charging at the federal level. As of 2007, in the  
8 preceding 19 years of the federal death penalty system, the Department of Justice sought  
9 the death penalty in 17% of death eligible cases.  
10

11 <http://www.deathpenaltyinfo.org/federal-death-penalty> (last visited Jan. 27, 2010).

12 Under Attorney General John Ashcroft the death penalty was sought in 22% of murder  
13 cases, under Alberto Gonzales it was sought in 19% of cases and under Michael  
14 Mukasey it was sought in 13% of cases. These numbers might be compared to Yavapai  
15 County where a notice of intent to seek the death penalty is filed in 34% of all first  
16 degree murder cases and in Maricopa County where the death penalty is sought in 46%  
17 of first degree murder cases. The federal death penalty has often been thought to be an  
18 important tool of law enforcement, yet it is employed at a rate much lower than we find  
19 in these two counties. Looked at another way, the rate of seeking the death penalty  
20 locally is almost three times that of the Department of Justice during the eight years of  
21 the Bush Administration.  
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25 This may shed some light on another disturbing statistic. As of 2008 there were a  
26 total nationwide of 3,279 people on death row. The Death Penalty in 2009, Year End

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27 <sup>9</sup> Coconino County Attorney's Office furnished a list of homicides, but due to an older filing system, case reviews  
28 were more difficult. Error in final numbers may be greater here.

1 Report, Death Penalty Information Center. <http://www.deathpenaltyinfo.org/reports>  
2 (last visited Jan. 27, 2010). Of these 129 were in Arizona. *Id.* Arizona accounts for 4%  
3 of America's death penalty population but only 2% of the population of the United  
4 States.<sup>10</sup> We know with some certainty that geography does not explain these numbers.  
5 If one were to commit a homicide at the famous four-corners monument on the Navajo  
6 Reservation, and if that homicide were deemed subject to the jurisdiction of the United  
7 States or of any of the four States touching at that point, any observer would see  
8 instantly that Arizona is the first place one would turn if death were the primary object  
9 and the last place one would wish to land if a respect for the constitutional infirmity in  
10 the death penalty were important. Colorado's death row is infinitesimal, New Mexico  
11 now has none, and even Utah lags far behind Arizona in its death row population. If  
12 there is a rational answer to these obvious disparities, they have yet to be discovered.

#### 16 **v. Aggravators in Non-Death Cases**

17 Another demonstration that Arizona's capital statutory scheme does not limit  
18 death penalty cases to the "worst of the worst" can be found in the State's practice of  
19 alleging identical aggravating circumstances between capital and non-capital cases.  
20 Arizona law requires that the aggravating circumstance of "especially cruel, heinous or  
21 depraved" be considered in determining an appropriate sentence for non-death penalty  
22 offenses. A.R.S. § 13-702( c)(5). The language requires the trier of fact to determine  
23 and the court to consider the aggravating circumstance of the "[e]specially heinous,  
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25  
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27 <sup>10</sup> The U.S. Census Bureau's estimate of Arizona's population in 2008 was 6,500,180.  
28 <http://quickfacts.census.gov/qfd/states/04000.html> (last visited Jan. 27, 2010). The estimate for the population of  
the United States was 304,059,724. <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Jan. 27, 2010).



1 cruel or depraved manner in which the offense was committed” in determining a  
2 sentence in a non-capital case. *Id.*

3        Nearly identical language is used by the State in filing a Notice of Intent to Seek  
4 the Death Penalty alleging the (f)(6) aggravating circumstance. A.R.S. § 751(f)(6). The  
5 aggravating circumstances are described as follows: “[t]he defendant committed the  
6 offense in an especially heinous, cruel or depraved manner.” An allegation of this  
7 aggravator by the State is sufficient to seek a death sentence. Importantly, it may also  
8 be an aggravating circumstance in a non-death case if the prosecutor does not decide to  
9 also file a Notice of Intent to Seek the Death Penalty.

12        The study we have done is revealing on this topic as well. Review of the 10% of  
13 homicides charged during a seven and a half year period in Maricopa County reveal that  
14 allegations of aggravating circumstances are routinely filed in non-death penalty cases.  
15 The County Attorney’s Office filed one or more of these allegations in three quarters  
16 (73%) of the first degree murder cases reviewed. In almost a quarter (23%) of the cases  
17 where such an allegation was filed, the “especially heinous, cruel, or depraved”  
18 aggravator was alleged but the death penalty was not sought. How is this even possible  
19 in a rational world where aggravators are intended to be used to distinguish between  
20 those for whom death is appropriate from those for whom it is not? We ask the State  
21 and the Court to consider this question. Keep in mind that in over 10% of first degree  
22 murders charged in Maricopa County, a prosecutor determined that first degree murder  
23 was committed in a way that could have warranted the death penalty pursuant to (f)(6)  
24 by filing an allegation under A.R.S. § 13-702.01, but for whatever secret and  
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1 unreviewable reasons, determined it was not a death penalty case. In Yavapai County,  
2 in a random sample of first degree murder cases where no death penalty was sought, an  
3 allegation of aggravating circumstances was filed in over a quarter (28%) of the cases;  
4 and, occasionally, the prosecutor relied on the allegation the the homicide was  
5 especially cruel, heinous, or depraved.  
6

7 A statute that permits an allegation of the same conduct to serve both as a  
8 qualifying element for the death penalty and for a non-death penalty case with no  
9 further distinction cannot serve legitimately the purpose of limiting the State in its use  
10 of the death penalty in the worst-of-the-worst circumstances. This is particularly  
11 troubling considering the data cited to the Court in the defenses' Motion to Declare  
12 Death Qualification of the Jury Unconstitutional, filed on December 18, 2009, and  
13 argued in this Court on January 13, of this year. We cited the Capital Jury Project  
14 findings that nearly one half (49.2%) of all capital jurors make their sentencing decision  
15 before the penalty phase of the trial even begins; that they feel strongly about their  
16 decision; and that they do not waver from it over the course of the trial.<sup>11</sup> Premature  
17 decision making was present in every state studied by the CJP.<sup>12</sup> Approximately 30%  
18 of all capital jurors, nationwide, made the decision that the defendant should receive the  
19 death penalty while evidence was still being introduced at the guilt phase of the trial.  
20 For some of these pro death jurors, it was the grotesque or gruesome nature of the crime  
21 that convinced them that death should be the punishment<sup>13</sup>. With these statistics in  
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26 <sup>11</sup> See Motion to Declare Death Qualification Unconstitutional, Apps. A, B, C, D, E, and J.

27 <sup>12</sup> Id. App. A: Bowers, Foglia, supra at p. 56

1 mind, it is hard to dismiss the importance of the original charging decision as having  
2 controlling weight in the life-or-death process.

### 3 4 **III. Jury Selection: How Death Qualification Kills.**

#### 5 **A. The Capital Jury Project Findings.**

6 The defense Motion to Declare Death Qualification of the Jury Unconstitutional  
7 for Its Failure, in Practice, to Meet the Minimum Constitutional Requirements Set forth  
8 in *Furman, Gregg* and Their Progeny, filed on December 18, 2009 outlined the many  
9 constitutional infirmities with death qualification of a jury. This motion incorporates  
10 the arguments laid out there for the purposes of considering the continued  
11 constitutionality of the death penalty. The uncontroverted research extensively cited  
12 and explained in that motion demonstrates that there are at least six critical failings with  
13 death qualified juries, in practice. These flaws establish that the death penalty is  
14 incapable of being applied in a manner that comports with federal and state  
15 constitutional precedents.  
16  
17

18 These six proven fatal flaws in the application of the death penalty are:

- 19  
20 • Premature decision making;  
21 • Failure of jury selection to remove large numbers of death biased jurors (*Morgan*  
22 excludables)<sup>14</sup> as well as the overall biasing effect of the selection process itself;  
23 • Pervasive failure by jurors to comprehend and/or follow penalty instructions;

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24 <sup>13</sup> Id. App. D at 17-18. Jurors commented as follows regarding when they pre-judged penalty:

25 KY: Once guilt was established that (the defendant) had committed this gruesome crime. I had no problem at  
all determining what punishment was applicable.

26 MO: Um, I'd say probably right when the prosecutor made the statement. She was stabbed twenty-two times.

27 SC: When they started to talk about the brutality of the crime.

28 <sup>14</sup> *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222 (1992).

- 1 • Widespread erroneous beliefs amongst jurors that a death sentence is required;
- 2 • Wholesale evasion of responsibility for the punishment decision — believing that
- 3 responsibility lies elsewhere; and
- 4 • Racism.

5 We will not repeat here the disturbing data revealed by the Capital Jury Project  
6 but it is certainly fair to conclude as one recent scholarly assessment put it: “[the CJP]  
7 reflects a fundamental flaw in the system; viewed altogether the evidence of system  
8 failure is overwhelming.”<sup>15</sup> And, at bottom, “system failure” really signals this: the  
9 Supreme Court’s Constitutional benchmark has not been achieved.  
10

#### 11 **B. The Bias of a media-bathed jury pool.**

12 We pause here to bring to the Court’s attention a recent article that we find  
13 particularly relevant. In a symposium last year, Professor Craig Haney addressed the  
14 especially haunting environment surrounding jury trials in death penalty cases today.  
15 His article opens with these words: “By the time they are old enough to vote or serve as  
16 jurors, most citizens in the United States have earned the equivalent of a Ph.D. in  
17 ‘media criminology.’” We tend to under-estimate how pervasive television crime has  
18 become. We know what our jurors see is not real, but we cannot grasp the extent to  
19 which “media myths and misinformation” substitute for real knowledge not only for  
20 jurors but for those who set public policy. Nowhere is this more patent, or more  
21 disturbing, than in death penalty cases.  
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27 <sup>15</sup> See Bowers, Foglia, Still Singularly Agonizing: Law’s Failure To Purge Arbitrariness From Capital Sentencing  
28 (2003) 39 Crim. Law Bulletin 51, 86.

Our questionnaire may help us begin to learn about some of the things our jury panel knows about the Steve DeMocker case itself, but no questionnaire is going to be able to plumb the biases born of now decades of exposure to media messages. The Capital Jury Project interviews revealed to some extent the depth of biasing, but most of those interviews occurred now nearly 20 years ago. Twenty years during which today's jurors have been exposed to thousands of hours of essential fiction about crime, criminal laws, courts, prosecutors and defense lawyers. There is no way any of us can undo the predispositions that any jury panel will be sure to have in a case involving a violent death of a female where the death penalty is being sought. We submit that this inherent biasing is itself a sufficient basis for declaring that the "narrowing" presupposed by the Supreme Court is in reality largely irrelevant "tinkering." We are attaching Professor Haney's article for the Court's and the State's review. Symposium: Media Criminology and the Death Penalty, 58 DePaul L. Rev. 689 (2009).

#### IV. The Intolerable Risk of Executing the Innocent.

Unlike other forms of punishment, the death penalty cannot be undone or compensated for. The *Gregg* Court recognized that capital punishment is “unique in its severity and irrevocability.” *Gregg*, 428 U.S. at 187. The greatest risk to any society which permits the execution of prisoners is mistakenly putting the innocent to death. The taking of innocent life is a wrong that can never be remedied and no system of capital punishment can be acceptable where the blood of the innocent stains the hands of the community as a whole.

1 No criminal justice system is perfect and ours is no exception. Approximately  
2 seven thousand, four hundred men and women have been sentenced to death since  
3 *Furman* and of these, one hundred thirty-five have been exonerated and released.  
4  
5 Warden, Rob, Reflections on Capital Punishment (2009), 4 NW J. L. & Soc. Poly' 329,  
6 \*22. The advent of DNA testing has left the criminal justice system reeling. The first  
7 DNA exoneration took place in 1989. Since then, two hundred and fifty people have  
8 been exonerated through DNA evidence. The Innocence Project, Facts on Post-  
9 Conviction DNA Exonerations, <http://www.innocenceproject.org/Content/351.php#>  
10 (last visited Feb. 16, 2010). Thousands of others have been exonerated before trial as a  
11 result of DNA evidence. Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev.  
12 1629, 1631 (2008). As a result of public reaction to the shocking number of DNA  
13 exonerations, every state in the nation, with the exception of Alaska, Massachusetts, and  
14 Oklahoma, has enacted legislation providing those convicted of serious crimes with the  
15 right to petition a court for post-conviction DNA testing. The Innocence Project, News  
16 and Information: National View, <http://www.innocenceproject.org/news/LawView2.php>  
17 (last visited Jan. 25, 2010). Although exonerations obtained through new testing of  
18 DNA evidence have received the most media attention, DNA only exists in  
19 approximately 20% of felony convictions. Garrett, *supra*, at 1649. In both the 20% of  
20 cases where DNA evidence exists as well as the 80% where it does not, proving  
21 innocence mostly depends on good luck.

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26 Considering the serendipitous convergence of circumstances that has been  
27 necessary for many of those exonerated to win their freedom, it stands to reason that the  
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1 lucky few actually exonerated are the tip of the iceberg. In fact, one scholar has  
2 calculated that between 3.3% and 5% of those convicted of felonies are actually  
3 factually innocent of these crimes. D. Michael Risinger, *Innocents Convicted: An*  
4 *Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology  
5 761, 762 (2007). As of July 1, 2009, three thousand two hundred seventy-nine inmates  
6 were on death row in the United States. The Death Penalty Information Center, Death  
7 Penalty Fact Sheet, <http://www.deathpenaltyinfo.org> (last visited Jan. 25, 2010). If  
8 3.3% of those on death row are factually innocent of the crimes for which they were  
9 convicted – one hundred eight innocent people are currently on death row.

12 The case of Anthony Porter, a Chicago man convicted of two murders, provides  
13 an excellent example of the random nature of exonerations. Porter exhausted his  
14 appeals, his family made his funeral arrangements, and he was a mere fifty hours from  
15 death when the court granted a stay of execution, not out of concern that Porter was  
16 innocent, but because Porter's IQ test results were so low that the judge was concerned  
17 that Porter might not understand what was happening. During this reprieve, an  
18 investigative journalism class at Northwestern took up the case, investigated, and  
19 obtained a recorded confession from the real killer. Porter was freed and prosecutors  
20 dismissed the charges. Warden, *supra*, at \*29-30.

23 In 1923, Judge Learned Hand stated "Our procedure has always been haunted by  
24 the ghost of the innocent man convicted. It is an unreal dream." *United States v.*  
25 *Garsson*, 291 F. 646, 649 (D.C.N.Y. 1923). Eighty-seven years later we have been  
26

1 forced to accept the painful truth. This is not an unreal dream but a nightmarish reality  
2 that must not be allowed to continue any longer.

3  
4 In Arizona there are 129 people currently on death row. Eight innocent people  
5 have been freed from Arizona's death row. Death Penalty Information Center.  
6 [http://www.deathpenaltyinfo.org/state\\_by\\_state](http://www.deathpenaltyinfo.org/state_by_state) (last visited Jan. 27, 2010). Given the  
7 vagaries of our system, it remains possible that Steve DeMocker could become number  
8 130. It remains just as possible that he could become one of the innocent men who  
9 faced execution at the end of a failed post-conviction process.  
10

11 **V. Insuperable post-conviction and AEDPA barriers.**

12 Among the myths surrounding the death penalty, none seem to have become more  
13 rooted than the myth that errors made by at the trial court level will be caught and  
14 corrected on appeal. Anyone deluded by that myth should ponder the so-called "actual  
15 innocence" proviso in Arizona's rules governing post-conviction relief. The burden of  
16 proof rests at this stage entirely on the defendant, and the burden is one no Arizona  
17 defendant has yet met in any case since the rule's adoption 10 years ago. The defendant  
18 must "demonstrate by clear and convincing evidence that the facts underlying the claim  
19 would be sufficient to establish that no reasonable fact-finder would have found the  
20 defendant guilty of the underlying offense." Ariz.R.Crim.Proc. 32.1. Stripped of the  
21 presumption of innocence, this is an unclimbable hill for any convicted defendant. The  
22 "Great Writ" embedded in the United States Constitution since this country's birth  
23 provides no solace either for the innocent man wrongfully convicted.  
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1 defendant guilty of the underlying offense.” Ariz.R.Crim.Proc. 32.1. Stripped of the  
2 presumption of innocence, this is an unclimbable hill for any convicted defendant. The  
3 “Great Writ” embedded in the United States Constitution since this country’s birth  
4 provides no solace either for the innocent man wrongfully convicted.  
5

6 Enacted in 1996, the Anti-Terrorism and Effective Death Penalty Act (AEDPA),  
7 among other things, placed limits on the grounds upon which someone on death row  
8 could request a new federal hearing. Under AEDPA, petitions for habeas corpus are not  
9 to be granted to those convicted by state courts unless the state court proceeding  
10 violated clearly established federal law. The Supreme Court has recently expressed  
11 uncertainty about whether AEDPA would permit a court to grant relief to an innocent  
12 person who had been sentenced to death. *In Re Davis*, 557 U.S. \_\_ (2009). Justice  
13 Scalia concluded that even if a court were convinced that Mr. Davis was innocent, “it  
14 would have no power to grant relief” in light of 28 U.S.C. §2254(d)(1). *Id.* According  
15 to the majority of the Supreme Court it is unclear if the AEDPA applies either to claims  
16 of actual innocence, or to habeas petitions filed directly with the Supreme Court. This  
17 question will not be answered until after Davis' evidentiary hearing. If that federal judge  
18 finds persuasive evidence of innocence, then the question of what federal courts can do  
19 about it will likely run its way back up to the Supreme Court. The disturbing reality  
20 today is that even with clear and convincing evidence a defendant like Steve DeMocker  
21 may never see the day when the horror of a wrongful conviction can be righted.  
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## 26 VI. The Elected Prosecutor’s Intolerable role.

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1 sentence, there are virtually no restrictions placed on a prosecutor's discretion in  
2 deciding whether to charge a particular homicide as a capital crime. Ariz. R. Crim. P.  
3 15.1(i). The only limitation placed on the prosecutor is that at least one aggravating  
4 factor must be present in order for the case to be prosecuted as a capital crime. *State v.*  
5 *White*, 194 Ariz. 344, 354 (1999). Given the extensive list of aggravating factors to  
6 choose from, this is rarely an impediment. *See* A.R.S. § 13-751(F). And, as our  
7 examination of charging decisions in Yavapai, Maricopa and Coconino Counties  
8 confirmed, these aggravating circumstances are often alleged in non-death penalty cases  
9 as well; making those cases in which death is sought and those in which it is not utterly  
10 undistinguishable. The judiciary has no practical role in the process. A court will not  
11 encroach on a prosecutor's decision to seek the death penalty absent a clear indication  
12 of misconduct. *Id.*

16 Throughout this Memorandum we have been forced to return to the reasoning of  
17 the United States Supreme Court that capital punishment is constitutional when it is  
18 reserved for the "worst of the worst." *See supra* § II.B.; *Roper v. Simmons*, 543 U.S.  
19 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit a  
20 narrow category of the most serious crimes and whose extreme culpability makes them  
21 the most deserving of execution") (quotation marks omitted). Jurors are unlikely to be  
22 able to even begin to distinguish the one case on which they deliberate from any other  
23 homicide. If any narrowing is to occur it must occur at the prosecutor's charging stage.  
24 That is far from what is happening in Arizona.

1 In Maricopa County, the rate at which prosecutors sought the death penalty in  
2 first degree murder cases rose from 30% prior to 2005 to over 45% in 2006. *See supra*  
3 *II.B.ii.* Likewise in Yavapai County in 2005 the death penalty was sought in 67% of  
4 first degree murder cases. *See supra II.B.i.* Aside from the constitutional issues arising  
5 from lack of competent counsel necessary to defend these cases, charging half of all  
6 first degree murder cases as capital crimes cannot comply with the directive of the  
7 Supreme Court that the death penalty be restricted to the worst of the worst. By  
8 definition, half is simply too large to constitute the worst; it cannot possibly constitute  
9 narrowing of any sort. If half of all first degree murder cases have something in  
10 common, then this something should be characterized as the norm rather than the  
11 exception.

12 Putting the numbers aside, it is inconceivable that prosecutors, who are required  
13 to make a judgment about which cases qualify as the worst of the worst, make this  
14 determination without ever considering mitigation evidence. Prosecutors cannot fulfill  
15 their role as gatekeepers if they never consider any evidence showing that a homicide is  
16 not among the worst of the worst or that special considerations militate against seeking  
17 the death penalty against a particular defendant. Yet this is precisely the procedure used  
18 in Yavapai and other counties in Arizona. Given the evidence already discussed about  
19 the dangers inherent in a death qualified jury, prosecutors have the obligation to make  
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1 an initial reasoned determination regarding the decision to charge a homicide as a  
2 capital crime.<sup>16</sup>

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4 This problem is not a new one but it is one that has been repeatedly ignored by  
5 prosecutors in this State. In 2006, the American Bar Association delivered a report  
6 entitled "Evaluating Fairness and Accuracy in State Death Penalty Systems: The  
7 Arizona Death Penalty Assessment Report." Among the central recommendations was  
8 the simple suggestion that prosecutor's offices "should have written policies governing  
9 the exercise of prosecutorial discretion to ensure the fair, efficient, and effective  
10 enforcement of criminal law." See ABA "Evaluating Fairness and Accuracy in State  
11 Death Penalty Systems: The Arizona Death Penalty Assessment Report" July 2006,  
12 page 114. Furthermore, the Arizona Death Penalty Assessment Team recommended  
13 that "the State of Arizona should require that all prosecuting agencies involved in  
14 capital case prosecutions have written policies for identifying cases in which to seek the  
15 death penalty." These recommendations have been ignored.

16  
17 Likewise, the Arizona Attorney General's Arizona Capital Case Commission made  
18 a similar unanimous recommendation in 2002. That Report urged that the policies  
19 should require the solicitation or acceptance of defense input before deciding to seek the  
20 death penalty. See Arizona Office of Attorney General Capital Case Commission Final  
21 Report, December 31, 2002. This recommendation has also been ignored.

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26 <sup>16</sup> The federal system has a capital case review procedure in which defense counsel is permitted to provide  
27 mitigation evidence in opposition to the death penalty before a final determination on whether to seek the death  
28 penalty is made. U.S. Department of Justice, The Federal Death Penalty System: Supplementary Data, Analysis  
and Revised Protocols for Capital Case Review,  
<http://www.justice.gov/dag/pubdoc/deathpenaltystudy.htm#capitalcasereviewprocedure>.

1       There are no policies in Yavapai County. There are no policies elsewhere. One  
2 might ask whether our Attorney General—the State’s chief law enforcement officer—  
3 has taken steps to assure the implementation of his Office’s now almost eight-year old  
4 report. One might also ask whether anything has been done to assure that the policies  
5 pursued in one county are similar to the policies on seeking death in any other county.  
6 The answer to all these questions is “no.” The absence of any coherent approach serves  
7 to assure that Arizona’s prosecutorial practices will continue to be best characterized as  
8 chaotic and unprincipled.  
9

11                   **VII. The Flaws in the Arizona Statutory Scheme and Why It Is**  
12                   **Unconstitutional As Applied to Mr. DeMocker.<sup>17</sup>**

13       Under Arizona Rules of Criminal Procedure 15.1(i) a prosecutor is required to file  
14 the notice of intent to seek the death penalty no later than 60 days after the arraignment,  
15 although this period can be extended for thirty days upon stipulation and upon motion of  
16 the state and approval of the court. The State is required to notice one or more of the  
17 aggravating circumstances under A.R.S. § 13-751(f). Fourteen aggravating  
18 circumstances are enumerated by the statute. §13-751(f)(1)-(14). Arizona Rule of  
19 Criminal Procedure 13.5(c) provides that the State’s filing of a notice of intent to seek  
20 the death penalty with noticed aggravating circumstances is an effective amendment of  
21 the charging document “and no further pleading needs to be filed.”  
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24       Before a sentence of death can be imposed under the Arizona statutory scheme, a  
25 jury must make three findings. First, the defendant must be convicted of first degree  
26 murder. *See* A.R.S. §§ 13-751(a); 13-751.01(a). Upon conviction of first degree  
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28 <sup>17</sup> Counsel reserve the right to file constitutional and other objections to the capital statutory scheme in Arizona.

1 murder, a separate “aggravation” hearing must then be held. *Id.* At that hearing the  
2 jury determines whether one or more of the alleged aggravating circumstances has been  
3 proven by the State beyond a reasonable doubt. §§13-751 (b) & 13-751.01 (c) & (e).  
4 The jury must make special findings on whether each proven aggravating circumstance  
5 was proven in the trial or in the aggravation phase. *Id.* To impose a death sentence, the  
6 jury must unanimously find one or more aggravating circumstances. *Id.* If they do so,  
7 there is a third hearing, the penalty phase. *Id.*

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9  
10 At the penalty phase both the defense and the State may present evidence on  
11 mitigating factors. § 13-751(b) & (c). The burden is on the defendant to prove the  
12 existence of the mitigating circumstances by a preponderance of the evidence. § 13-  
13 751(c). The State “may present any evidence that demonstrates that the defendant  
14 should not be shown leniency.” §751.01(g). “The trier of fact shall impose a sentence  
15 of death if the trier of fact finds one or more of the aggravating circumstances  
16 enumerated in subsection F of this section and then determines that there are no  
17 mitigating circumstances sufficiently substantial to call for leniency.” *Id.* at (e). This is  
18 the system. It is constitutionally flawed.

#### 19 20 21 **A. The Presumption of Death is Unconstitutional.**

22 The Eighth and Fourteenth Amendments dictate that there be an individualized  
23 determination of the appropriate sentence. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954,  
24 57 L.Ed.2d 973(1978). Simply allowing the mitigating evidence to be admitted is not  
25 enough. “The sentencer must also be able to consider and give effect to that evidence in  
26 imposing sentence.” *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989)  
27 (overruled in part by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d  
28

1 335); *see also Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986)  
2 (“Evidentiary ruling excluding relevant mitigating evidence of defendant’s adjustment  
3 to prison setting violates *Eddings*); *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860  
4 (1988) (requirement of unanimous jury finding on mitigating factors created  
5 unconstitutional barrier to consideration of relevant mitigating evidence). Only when  
6 the capital juror is free to consider and give effect to all mitigating evidence is there an  
7 assurance that there has been an individualized sentencing determination. *Lockett*.

8 Counsel acknowledge that the majority of the Supreme Court in *Walton v.*  
9 *Arizona* rejected the argument that the Arizona statute unconstitutionally requires a  
10 death sentence. *Walton v. Arizona*, 497 U.S. 639 (1990). We submit, however, that  
11 Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, got it right in  
12 their dissent in *Walton* when they argued:  
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14  
15 If the mitigating and aggravating circumstances are in equipoise, the  
16 [Arizona] statute requires that the trial judge impose capital punishment.  
17 The assertion that a sentence of death may be imposed in such a case runs  
18 directly counter to the Eighth Amendment requirement that a capital  
sentence must rest upon a ‘determination that death is the appropriate  
punishment in a specific case.’ [Citation omitted.]

19 497 U.S. at 687. The Arizona statute is unconstitutional because it does not  
20 allow individual jurors to make a determination about the appropriate  
21 punishment.  
22

### 23 **B. The Requirement of Unanimity is Unconstitutional.**

24 In *Mills v. Maryland* the Supreme Court held that the requirement of a  
25 unanimous jury finding on mitigating factors created an unconstitutional barrier  
26 to consideration of relevant mitigating evidence. *Mills v. Maryland*, 486 U.S.  
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1 367, 108 S.Ct. 1860 (1988). Earlier in *McKoy v. North Carolina*, 494 U.S. 433,  
2 110 S Ct. 1227 (1990) the Court held that jurors must be allowed to consider any  
3 relevant mitigation evidence in making their sentencing decision and that  
4 sentencing statutes cannot require the jurors to unanimously find the existence of  
5 any individual mitigating circumstance before the mitigator can be considered.  
6 *McKoy*, 494 U.S. at 439-40, 110 S.Ct. 1227. Specifically the *McKoy* Court held  
7 that the unanimity requirement was unconstitutional because it permitted “one  
8 holdout juror to prevent the others from giving effect to evidence that they  
9 believe calls for a “ ‘sentence less than death.’ ” *Id.* (citing *Eddings v. Oklahoma*,  
10 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982), quoting *Lockett*,  
11 *supra*, at 604, 98 S.Ct., at 2964 (plurality opinion)).

12 The Arizona death penalty statutes permit exactly what *McKoy* forbade.  
13 The Arizona statute requires the jury to unanimously determine if a “death  
14 penalty is not appropriate,” A.R.S. §13-752(H), whether aggravating  
15 circumstances are found, *Id.* at (J) and (L), as well as what penalty to impose. *Id.*  
16 at (K). In each of these instances the statute provides that the court shall impanel  
17 another jury for determination of these issues in the event the initial jury does not  
18 reach a unanimous conclusion. This unanimity requirement permits the finding  
19 of one juror to overrule the findings of other jurors about critical issues in  
20 reaching a death verdict – whether aggravators exist and what the appropriate  
21 penalty is. In *McKoy v. North Carolina* the Supreme Court held that it would be  
22 the “height of arbitrariness to allow *or* require the imposition of the death  
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1 penalty” where 1 juror was able to prevent the other 11 from giving effect to  
2 mitigating evidence.” *McKoy v. North Carolina*, 494 U.S. 433, 110 S Ct. 1227  
3 (1990) (citing *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860 (1988)  
4 (emphasis in original). While the Arizona Supreme Court rejected the unanimity  
5 argument in *State v. Andriano*, 215 Ariz. 497 (2007), it focused only on the  
6 requirement that the jury have the opportunity to individually determine if a  
7 specific mitigator was sufficient to call for leniency. What the Arizona Supreme  
8 Court did not discuss or consider is the requirement that simply allowing the  
9 mitigating evidence to be admitted is not enough. “The sentencer must also be  
10 able to consider and give effect to that evidence in imposing sentence.” *Penry v.*  
11 *Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 2947 (1989) (overruled in part by  
12 *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335).

16 **C. The Breadth of the Aggravators is Unconstitutional.**

17 Aggravating factors must provide sufficient guidance for the jury to determine  
18 the presence or absence of the factor. A state sentencing scheme “must channel the  
19 sentencer’s discretion by clear and objective standards that provide specific and detailed  
20 guidance that make rationally reviewable the process for imposing a sentence of death.”  
21 *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S Ct. 1759, 1765 (1980) (internal  
22 quotations omitted) (citations omitted). If an aggravating factor fails to provide  
23 sufficient guidance, the Supreme Court has found it violates the Eighth and Fourteenth  
24 Amendments of the United States Constitution. *Id.* at 433, 100 S Ct. at 1767. The  
25 aggravating factor in *Godfrey* provided that death could be imposed if the murder was  
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1 "outrageously or wantonly vile, horrible or inhumane" in that it involved "torture,  
2 depravity of mind, or an aggravated battery to the victim." *Id.* at 429, 100 S.Ct. at 1765.  
3  
4 In reversing Godfrey's sentence, the Supreme Court noted that there was nothing in the  
5 words "outrageously or wantonly vile, horrible or inhumane" to sufficiently guide the  
6 jury's discretion. *Id.* at 433, 100 S.Ct. at 1767. Likewise in *Maynard v. Cartwright*, 486  
7 U.S. 356, 366, 108 S.Ct. 1853, 1860, 100 L.Ed.2d 372 (1988), the Supreme Court found  
8 Oklahoma's statutory aggravating factor --that the murder was "heinous, atrocious or  
9 cruel" -- to be unconstitutionally vague on its face and as applied because no limiting  
10 construction was utilized. See also *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926  
11 (1992) (finding instruction for aggravator that murder was "especially wicked, evil,  
12 atrocious, or cruel" violated the Eighth Amendment because of vagueness); *Sochor v.*  
13 *Florida*, 504 U.S. 527, 532, 112 S.Ct. 2114, 2119 (1992); *Stringer v. Black*, 503 U.S.  
14 222, 232, 112 S.Ct. 1130, 10040 (1992); *Parker v. Dugger*, 498 U.S. 308, 319-321  
15 (1991); *Clemons v. Mississippi*, 494 U.S. 738, 752, 110 S.Ct. 1441, 1450 (1990).

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19 **i. A.R.S. § 751(f)(2) – Prior and Concurrent Offense**

20 Over time the Arizona legislature has increased the scope of A.R.S. § 751(f)(2)  
21 to include a range of both prior and concurrent offenses well beyond any other state in  
22 the country. When the death penalty was reinstated in Arizona after *Furman*, the (f)2  
23 aggravating factor was limited to cases where the "defendant was previously convicted  
24 of a felony in the United States involving the use or threat of violence on another  
25 person." 1973 Ariz. Sess. Laws 138, § 5. In 1993 this language was amended to read  
26 "[t]he defendant was previously convicted of a serious offense, whether preparatory or  
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1 completed.” 1993 Ariz. Sess. Laws § 1. In 2003, the legislature again broadened this  
2 aggravating circumstance to read “[t]he defendant has been or was previously convicted  
3 of a serious offense, whether preparatory or completed. *Convictions for serious offenses*  
4 *committed on the same occasion as the homicide, or not committed on the same*  
5 *occasion but consolidated for trial with the homicide, shall be treated as a serious*  
6 *offense under this paragraph.*” 2003 Ariz. Sess. Laws 255 § 1 (emphasis supplied). In  
7 2005, the list of “serious offenses” was further expanded. 2005 Ariz. Legis. Serv. Ch.  
8 325 § 2.

11 In *State v. Rutledge*, 206 Ariz. 172, 178, 76 P.3d. 443, 449 (2003), the State of  
12 Arizona asked the Arizona Supreme Court to expand the scope of the (F)(2) aggravating  
13 factor to include contemporaneous convictions as previously committed offenses. The  
14 reason offered was that a conviction for a contemporaneous offense, even if it preceded  
15 the homicide by only a few seconds, complied with the literal meaning of a “previous”  
16 conviction. *Id.* At the time, of course, the (F)(2) aggravating factor only stated that it  
17 was an aggravating factor if “the defendant was previously convicted of serious offense,  
18 whether preparatory or completed.” This had been understood and applied to mean  
19 actual previous convictions separate and apart from the offense for which the state was  
20 seeking death. It did not contain the language now included in the statute that seeks to  
21 allow a contemporaneous offense to be treated as a previous conviction. Based on a  
22 long-standing body of Arizona capital jurisprudence, and noting with approval that the  
23 trial court had rejected the state’s position because (1) “the state’s interpretation of the  
24 (F)(2) aggravating factor would broaden the class of death eligible defendants, contrary  
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1 to the legislative intent to narrow that class of persons, . . .” and (2) recidivist prior  
2 convictions for serious offenses had long been accepted as a legitimate sentencing  
3 factor, the Arizona Supreme Court rejected the state’s invitation to treat a  
4 contemporaneous offense as a previous conviction. “[W]e hold that Rutledge’s  
5 conviction for a ‘serious offense, occurring simultaneously with a murder conviction  
6 can not be used for (F)(2) purposes under the version of A.R.S. § 13-703(F)(2)  
7 applicable to *Rutledge*.”<sup>18</sup>  
8  
9

10 The Arizona Legislature’s broadening of this aggravating factor to expand the  
11 class of persons eligible for death and the way it is sought to be applied by the State in  
12 this case is unconstitutional. As previously constituted, by requiring a previous  
13 conviction of a serious offense, the Arizona Legislature did in fact narrow the class of  
14 death eligible persons to those individuals who had a demonstrated a recidivist  
15 propensity to commit serious crimes. In other words, “[i]t is rational to measure such  
16 propensity by the number of other times one has engaged in such conduct rather than by  
17 the number discreet serious crimes committed during the defendant’s criminal conduct  
18 at the time of the subject murder.” *Rutledge, supra*.  
19  
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21 Given the current wording of the statute, this rational limitation of assessing prior  
22 or previous convictions as a condition precedent of death eligibility is gone; Arizona is  
23 the only state to have discarded this limitation. Every other state in the country that has  
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26 <sup>18</sup> The Court noted in a footnote that on May 26, 2003, the legislature had amended A.R.S. §13-703(F)(2) to  
27 include a “serious crime” committed contemporaneously with the murder as a previous conviction under A.R.S. §  
28 13-703(F)(2). 206 Ariz. at 178, 76 P.3d at449. The Court did not address the constitutionality of the expanded  
(F)(2) aggravating factor nor, to our knowledge, has it in any subsequent case.

1 the death penalty, and that has as one of its aggravating factors a prior or previous  
2 conviction, limits application of this aggravator to a prior or previous conviction for  
3 homicide, some violent assault, or a serious felony or offense involving the threat or use  
4 of violence. No state or capital sentencing statute that we have found treats a  
5 *contemporaneous* criminal offense as a prior or previous conviction. No state has the  
6 “contemporaneous” language that was added to Arizona’s statute in 2003. And virtually  
7 every state’s prior conviction aggravator is limited to prior convictions for homicide or  
8 seriously violent conduct. See, *inter alia*, Alabama Code, § 13A-5-40 (prior conviction  
9 is limited to a prior or previous conviction for homicide); Arkansas Revised Statutes §  
10 5-4-604(3) (prior conviction involving violence or serious offense involving serious risk  
11 of physical injury); California Penal Code § 190.2(a)(2) (prior conviction is for  
12 homicide); Colorado Revised Statutes § 18-1.4-102(5) (priors are for prior convictions  
13 involving convictions for homicide or violent assault, or for the threat of use of  
14 violence); Connecticut Penal Code § 53(a) 46(a)(i) (priors are for historically prior  
15 convictions requiring the infliction of serious bodily injury); Georgia Code § 17-10-  
16 30(b) (prior convictions are for historical prior convictions involving conviction for a  
17 capital felony or a crime of violence); Idaho Statutes § 19-2515(9)(a) (prior conviction  
18 is for a previous conviction for another murder); Kentucky Revised Statutes §  
19 532.025(2)(a) (a prior conviction is for a previous conviction for a capital offense or a  
20 serious history of serious assaultive criminal convictions); Louisiana Code of Criminal  
21 Procedure § 905(4)(A)(3) (previous conviction of unrelated murder or unrelated crime  
22 of violence); Montana Code § 46-18-303(L)(ii) (previous conviction of another

1 deliberate homicide); Nevada Revised Statutes § 200.033(2) (prior conviction of  
2 another murder or felony involving the use or threat of violence); North Carolina  
3 Revised Statutes § 15A-2000(e)(2)(3) (previous conviction for capital felony or felony  
4 involving use or threat of violence); South Dakota Codified Laws § 23A-27A-1 (prior  
5 record of conviction for which death or life imprisonment was imposable or prior  
6 conviction of a crime of violence); Tennessee Code § 39-13-204(i)(2) (prior conviction  
7 for unrelated felony involving use of violence); Utah Code § 76-5-202(i) (previous  
8 conviction of murder or attempted murder or other enumerated crimes of violence); and  
9 Wyoming Statutes § 6-2-102(h)(ii) (previous conviction of another murder or violent  
10 felony).

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13       Other than multiple homicides committed on the same occasion, which are not  
14 fictionalized as prior or previous convictions, no state other than Arizona treats  
15 contemporaneous offenses as a prior or previous conviction for purposes of proving an  
16 aggravating factor. Arizona is the only state that treats contemporaneous convictions as  
17 previous convictions for purposes of death eligibility. Also, whereas other death  
18 penalty statutes that rely on prior or previous convictions limit their death eligible priors  
19 to homicides, crimes of violence or crimes where there is a threat of violence or serious  
20 physical injury, Arizona's (F)(2) aggravating factor expands death eligibility to  
21 homicides that are accompanied by over 30 other felonies. Far from narrowing death  
22 eligibility, the amendment to the (F)(2) aggravator grossly expands it. A.R.S. § 13-  
23 703(F)(2) provides in pertinent part that "convictions for serious offenses committed on  
24 the same occasion as the homicide, . . . shall be treated as a serious offense under this  
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1 paragraph." A.R.S. § 13-703(I) (defines serious offenses as any of the following: first  
2 degree murder; second degree murder; manslaughter; aggravated assault resulting in  
3 serious physical injury or committed by the use, threatened use or exhibition of a deadly  
4 weapon or dangerous instrument; sexual assault; any dangerous crime against children;  
5 arson of an occupied structure; robbery; burglary in the first degree; kidnapping; sexual  
6 conduct with a minor under 15 years of age; burglary in the second degree; and  
7 terrorism. (Id.)  
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10 Our examination of capital case charging decisions in Arizona demonstrates that  
11 this aggravating circumstance can be made to apply to virtually every first degree  
12 murder case. The Coconino County Attorney's Office alleged F(2) in 100% of the  
13 death penalty cases filed within a seven and half year time. In Yavapai County, F(2)  
14 was alleged in 75% of the death penalty cases noted. Similarly, the Maricopa County  
15 Attorney's Office alleged F(2) in 60% of the cases reviewed.  
16

17 To pass constitutional muster, a death penalty statute must genuinely narrow the  
18 class of persons eligible for the death penalty. Allowing one of thirty or more  
19 contemporaneous offenses to be treated as a previous conviction to render an individual  
20 death eligible under (F)(2) impermissibly disregards the narrowing function a capital  
21 sentencing statute is required to perform. It also disregards the historically valid  
22 sentencing function served by taking into consideration an individual's prior history  
23 with the criminal justice system and their propensity toward recidivism.  
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26 The breadth of this aggravator is shocking when considered in the context of this  
27 case. The concurrent offense which the State seeks to use as the aggravating  
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1 circumstance in this case is the allegation of burglary in Count II of the current  
2 indictment. The State's theory appears to be that Mr. DeMocker entered Ms. Kennedy's  
3 home with the intent to kill her. Thus, the fact that Mr. DeMocker allegedly killed Ms.  
4 Kennedy in her home, as opposed to in the yard or in his home, is the sole difference  
5 that distinguishes for purposes of this aggravating circumstance, whether this case is a  
6 death penalty case or not. Under this theory, any homicide that takes place in a victim's  
7 home, car, garage or on other personal property is properly a death penalty case. This  
8 result is very far from the narrowing function required of the United States and Arizona  
9 constitutions.

12 **ii. A.R.S. § 751(f)(6) – Especially heinous, cruel or depraved**

13 As the *Godfrey* Court explained, an aggravator is unconstitutional where "[a] person  
14 of ordinary sensibility could fairly characterize almost every murder" as qualifying.  
15 Both the Arizona and the U.S. Supreme Court have held that the especially cruel,  
16 heinous or depraved aggravating factor is unconstitutionally vague. See *Walton v.*  
17 *Arizona*, 497 U.S. at 654, 100 S Ct. at 3057; *Woratzeck v. Lewis*, 863 F. Supp. 1079  
18 (1994). Both courts determined that Arizona courts had further defined the vague  
19 terms in a constitutionally sufficient manner – that is, to provide sufficient sentencing  
20 guidance. Significantly, both courts' decisions that the guidance was constitutionally  
21 sufficient hinged on the fact that a judge was the sentencer, and not a jury. As the  
22 *Woratzeck* court noted "[t]he fact that a trial judge performs the sentencing calculus is  
23 of critical significance for it would seem the necessity that a limiting construction  
24 specify what constitutes a heinous, cruel or depraved murder is directly proportional to  
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1 the limited experience and resources upon which the sentencer may draw to evaluate the  
2 facts presented and make the required individualized determination as to the  
3 appropriateness of the death penalty.” 863 F. Supp. at 1087 (emphasis added). The  
4 court in *Walton* was likewise focused on the differences between judge and jury  
5 sentencing. “Trial judges are presumed to know the law and to apply it in making their  
6 decisions.” *Walton*, 497 U.S. at 653, 110 S Ct. at 3057.  
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9 As this Court well knows, judge sentencing is a thing of the past and under the  
10 Arizona death penalty statute and *Ring*, a jury finds the facts essential to sentencing.  
11 For that reason, as the *Woratzek* court held, when a jury determines sentencing “the  
12 narrowing construction must be specific in order to channel their discretion.” 863 F.  
13 Supp. at 1087. The phrases “especially heinous, cruel and depraved” do not provide  
14 clear and objective standards to guide the jury Furthermore, this aggravating  
15 circumstance does not provide the required “meaningful basis for distinguishing the few  
16 cases in which [the death penalty] is imposed from the many cases in which it is not.”  
17 *Gregg*, 428 U.S. at 189, 96 S Ct. at 2932. The result is an arbitrary and capricious  
18 infliction of the death penalty.  
19

20 Our research revealed that the Coconino County Attorney’s Office alleged F(6)  
21 in 100% of the death penalty cases filed within a seven and half year time. In Yavapai  
22 County F(6) was alleged 50% of the time. Similarly, Maricopa County Attorney’s  
23 Office alleged F(6) in 78% of the case reviewed. Moreover, this aggravating  
24 circumstance is also frequently alleged in non-death penalty cases. In Maricopa County  
25 for example, this aggravating circumstance was alleged in 23% of the 73% of the cases  
26 where an aggravating circumstance is filed in a non-death penalty case.  
27  
28

1 The Arizona Office of Attorney General Capital Case Commission Final Report,  
2 noted that this aggravator was the leading single aggravator found where people in  
3 Arizona are sentenced to death and that there were serious concerns about whether the  
4 factor meets constitutional requirements. "Concerns raised during Commission  
5 discussions were that the aggravator is overused and vague." Arizona Office of  
6 Attorney General Capital Case Commission Final Report, December 31, 2002. The  
7 Report acknowledged that of the 228 people sentenced to death in Arizona, 39 were  
8 sentenced to death based on a finding of the sole aggravator of (f)(6). It was the single  
9 leading aggravator. The Final Report recommended further study on the continued use  
10 of this aggravator. Counsel is not aware of any additional studies.

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13 **iii. A.R.S. § 751 (f)(5) – Pecuniary gain**

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15 The pecuniary gain aggravator alleged in Mr. DeMocker' case is also alleged at  
16 an extremely high rate in capitally charged cases in Arizona demonstrating its failure to  
17 properly narrow cases. F(5) is alleged in 75% of the cases death penalty cases filed in  
18 Coconino County and 38% of the death penalty cases filed in Yavapai County. It is  
19 clearly not an aggravating circumstance that limits cases to the "worst of the worst."  
20 The State will try to argue in this case that all of its proof with respect to Steve  
21 DeMocker's personal and professional financial condition are relevant to support the  
22 "pecuniary gain" aggravator. There is not even a hint that the State sees the intolerable  
23 overbreadth in its approach. The jurors, apparently, could find this aggravator based on  
24 any of a host of arguments, including the terms of the divorce settlement that had been  
25  
26  
27  
28

1 inked one month before Carol Kennedy's death. The absence of guidance for the jury  
2 will leave "pecuniary gain" to be very much in the eye of each beholder on this jury.

3  
4 **D. The Failure of the Court to Apply Rule 15 Disclosure Requirements is**  
5 **Unconstitutional.**

6 The defense has complained to this Court many times about the State's repeated  
7 failure to comply with the requirements of Rule 15 in this case. To begin, the State did  
8 not timely allege the initial aggravating circumstances. Then, well past the deadline, the  
9 State added the (f)(6) aggravating factor. There is no provision in Rule 15 for this to  
10 occur. Further, the State has repeatedly ignored the disclosure deadlines set both by  
11 Rule 15 and by this Court. Counsel have not received disclosure under Rule 15.1(i)  
12 with respect to any expert; experts have been disclosed late; the disclosure continues to  
13 trickle in, with disclosure outstanding and received as late as slightly more than three  
14 months from trial. The State has also interfered repeatedly with Mr. DeMocker's ability  
15 to review disclosure and assist in his own defense. At one point removing all paper  
16 disclosure from the defendant and offering a state supplied computer and then reversing  
17 itself on that issue as well. The Defendant's recent motion to dismiss the death penalty  
18 based on repeated violations of Rule 15.1 is hereby incorporated in this motion.

19  
20  
21 In the context of a death penalty case where a defendant is to be accorded a super  
22 due process, this lackadaisical response by the State to the Rules governing disclosure is  
23 simply unacceptable. The defense has not been able to properly retain and prepare its  
24 experts, conduct interviews of the State's witnesses or otherwise prepare a defense. Mr.  
25 DeMocker has now been incarcerated for over 15 months and continues to assert his  
26  
27  
28

1 innocence. The defense has consistently indicated an intent to proceed to trial on May  
2 4, 2010 so Mr. DeMocker can be exonerated and return to his family.

3  
4 **VIII. Conclusion**

5 We look forward to the State's Response to this Motion and Memorandum. We  
6 understand that most prosecutors and courts would treat this Memorandum as little more  
7 than a boilerplate filing required to preserve arguments heretofore deemed to be without  
8 merit. As this Court has seen, however, there are constitutional issues that have not  
9 been ventilated in this State. There are charging records that have never been studied  
10 before and concerns expressed that have not been the subject of prior rulings. Mr.  
11 DeMocker and the people of Arizona deserve whatever time the prosecution and this  
12 Court will devote to these issues.  
13  
14

15 Respectfully submitted this 16th day of February, 2010.

16  
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18  
19 By: \_\_\_\_\_

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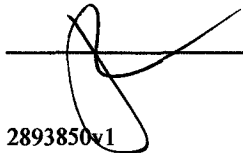
26 ORIGINAL of the foregoing filed  
27 this 16 day of February 2010, with:  
28 Jeanne Hicks,

1 Clerk of the Court  
Yavapai County Superior Court  
2 120 S. Cortez  
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4 COPIES of the foregoing hand delivered  
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# **EXHIBIT A**



## 2 of 2 DOCUMENTS

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**SYMPOSIUM:** MEDIA, RACE, AND THE DEATH PENALTY: EIGHTEENTH ANNUAL DEPAUL LAW  
**REVIEW SYMPOSIUM:** ARTICLE: MEDIA CRIMINOLOGY AND THE DEATH PENALTY

**NAME:** Craig Haney\*

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**SUMMARY:**

... For example, one television critic described the unlikely crime-oriented programming of one cable network: On Lifetime, the channel that branded itself as "television for women," danger and looming death seem to be the unifying concept of the programming. ... In addition to the ubiquitous crime dramas and the proliferation of so-called "real life" crime programs (such as Cops) on television, crime stories dominate local television newscasts. ... As one newspaper account reported at the time, "interest by viewers around the nation was reflected in the ratings this week." ... Media criminology contributes directly to this prominent cultural theme by exaggerating the apparent magnitude of the crime problem, both by misrepresenting the frequency of criminal victimization (suggesting to audience members that their chances of being a crime victim are greater than, in fact, they are) and overestimating the extent to which serious and sensationalistic violent crime--the primary focus of news coverage and crime drama--occurs. ... In addition to amplifying fears about potentially capital crimes and endorsing the most severe punishments as the most appropriate response, media criminology repeatedly reinforces a dominant cultural narrative about the origins of violent criminality--one that implies something about the nature of the persons who perpetrate such crimes and the societal policies that are needed to properly address them. ... Thus, whatever else citizens might take from the media criminology curriculum to which they are exposed, they repeatedly learn that violent criminality stems from the morally blameworthy choices of its individual perpetrators. ... More specifically, if the stereotypes and flawed lessons that characterize media criminology go unchallenged in a capital case, they may jeopardize the jury's ability to engage in the kind of individualized sentencing that is supposed to be the hallmark of modern death penalty jurisprudence. ... When the crime master narrative and the media criminology that supports it are effectively challenged--with real science that contextualizes behavior and explains the forces and factors that have helped to shape a defendant's life course--death will no longer serve as the default option for jurors who have become "expert" on these issues by mastering the false criminological lessons that the media has provided them about who commits serious violent crime and why.

**TEXT:**

Introduction

By the time they are old enough to vote or serve as jurors, most citizens in the United States have earned the equivalent of a Ph.D. in "media criminology." The average eighteen-year-old has watched some twenty thousand hours of television programming, n1 much of which has been devoted to crime-related news and drama. n2 Moreover, adults are afforded seemingly limitless opportunities to obtain continuing, post-doctoral education. Indeed, the typical American household now holds more television sets than people, n3 and the sets are on over eight hours per day. n4 By most estimates, crime continues to be the industry's mainstay, with approximately one-third of television programming devoted to crime and law enforcement shows. n5 News media are also dominated by crime-oriented content. n6 For example, an estimated one-fifth of local television and newspaper reporting is devoted to crime. n7

I have argued elsewhere that the media play a critically important and potentially deleterious role in helping to shape criminal justice policy. n8 Media myths and misinformation substitute for real knowledge for many members of the public who--as citizens, voters, and jurors--participate in setting policy agendas, advancing political initiatives, and



making legal decisions. n9 Media messages about the causes of crime, the nature of violent criminality, and the most effective strategies for addressing crime-related problems are especially influential because they address topics with which most citizens have little or no direct experience. n10

In this Article, I examine in greater depth some particularly problematic aspects of media criminology. I argue that the crime-related media content in which the American public is now steeped and schooled has increased in amount and intensity in recent years, penetrating even more deeply into popular culture and personal consciousness. Thus, it is especially important to examine the "core curriculum" that makes up the educational program from which so many citizens continue to graduate. The potential consequences of its fundamentally misguided lessons are broadly problematic in any context where citizens have direct input into and influence over crime-related policies and decisions. However, this is particularly true in death penalty cases. In no other kind of criminal case does the public's collective view of the nature of criminality--the upshot of their flawed criminological education--play so significant a role.

Indeed, citizens are absolutely central to the administration of capital punishment in the United States. In part for this reason, public attitudes toward capital punishment are the ones that have historically been most often surveyed. n11 Voters are accustomed to taking sides in policymaking debates about the death penalty and also in making electoral choices based in part on the death-penalty-related views and positions of political candidates. n12 Yet, the public's role in actual capital case decision making is truly unparalleled. Citizen-jurors--and only they--are called upon to choose between life and death in capital trials. n13 Accordingly, this Article explores some of the ways in which the flawed criminological curriculum and overall media mis-education may affect these jurors in the course of this decision-making process.

Because of the sheer amount of crime-oriented media to which members of the public are exposed, it is tempting to deal in generalities--for example, by bemoaning only the overall bias and distortions that collectively characterize the messages that are conveyed. But doing so can lead legal analysts and death penalty attorneys to overlook the truly extreme content and unsettling tenor of the ubiquitous criminological lessons that the media regularly disseminate to citizen-jurors across the country. This is a media genre in which the "devil"--sometimes quite literally--really is in the details. Thus, taking a more in-depth look at some specific, representative examples will more clearly illustrate the nature of the flawed criminology that is being absorbed by citizens and provide a more realistic sense of its likely effects.

Beyond the nature and content of the messages themselves, it is also important to address the increased penetration of the media into the day-to-day lives and consciousness of citizens--that is, to examine some of the new relationships that have developed between crime-related media and the audience members who consume them. An emerging set of media marketing ploys and strategies have added a participatory dimension to the consumption of crime-related messages and products. This industry now encourages its customers to become actively engaged with this material--rather than to passively consume it--and presents audience members with numerous opportunities to do so.

In any event, the full potential of such pervasive criminological content can only be appreciated by examining some examples of the form that it now takes (however jarring it may be to encounter this kind of material in an academic, legal forum). Understanding the potential consequences of this widespread process of mis-education requires us to come to terms with the particulars of the curriculum on which it is based and the different "active learning" contexts in which it is taught.

## II. Criminology for the Masses: The Ever-Expanding Media Market for Crime

Media criminology is a commercial product rather than a body of what is ordinarily considered "real" knowledge. Obviously, it is not based on a collection of systematically deduced theoretical propositions or carefully arrived at empirical truths about the realities of crime and punishment. Its substantive lessons are intended to generate audience share rather than to convey accurate information or provide a valid framework for understanding the nature of crime. Simple profitability is not only the primary basis for the media's continuing obsession with crime-related topics, but also the only standard to which media executives, producers, and programmers are typically held accountable. n14 At one level, this is neither surprising nor controversial. More generally, "it is a normal and necessary function in all the media to pursue some subjects and ignore others, to emphasize some material and de-emphasize other. It is within this necessary professional decision making that corporate values and the central aims of owners are embedded." n15

Several things follow from the fact that media criminology is judged more by its bottom line than its truth value. The first is that its relationship to the actual realities of crime and punishment is merely incidental. To the extent that it

is more profitable for media to appear to be valid—to retain a higher degree of apparent verisimilitude—it will be portrayed and marketed as such; otherwise, it will not. Moreover, the profitability of apparent realism makes it subject to manipulation. That is, convincing the audience that something is accurate, true, or realistic is primarily what matters, not whether this manufactured impression is factually correct. In fact, over time, audience members may come to judge the "accuracy" of media depictions and real-life events with the same metric—one that is derived primarily if not exclusively from their media-based "educational" experiences and no others. n16

Second, the amount of crime-related programming bears no necessary relationship to the actual amount of crime that exists at any particular time in the society at large. n17 Thus, as a number of commentators have reported, "by the early 1970s the cop show had entirely supplanted the Western as the dominant genre of narrative fiction on U.S. television." n18 A little more than a decade later—by the mid-1980s—there were an estimated twenty-eight police and private detective shows on prime time television alone. n19 However, despite fluctuations in the crime rate over the next several decades, "cop shows" maintained their new-found dominance. If anything, the popularity of crime drama increased as the overall amount of crime in American society dropped throughout the 1990s.

More remarkably, perhaps, the same pattern applied to crime-related news coverage as well. Network news programs greatly increased their crime focus in the early 1990s, just as crime rates started a consistent decline. n20 As one report noted: "In the real world, homicides declined by 13 percent between 1990 and 1995. On the network news during the same period, coverage of murders increased by 336 percent..." n21 Moreover, as I discuss below, entire new genres of crime-related media that blurred the line between fact and fiction and news and drama emerged even as crime rates continued to decrease.

Decoupling crime rates from media crime coverage and the public's concern over crime enabled commercial interests to profit more readily from promoting the fear of crime. The greater the level of such fear and the more extreme the public's obsession with the issue of crime, the larger the potential market not only for crime-related media content but also for a vast array of inter-related crime-control products and services. n22 Indeed, crime-related media and associated crime control enterprises proliferated rapidly during a period of consistently decreasing crime rates.

The public's fascination with crime and punishment, among other things, gradually transformed the nature of television programming. Although crime-related programming had already established itself as "the single most popular story element in the fifty-year history of ... television," n23 its popularity consistently increased. Shows that focused exclusively on crime-related topics currently pervade the airwaves, many achieving such heights of popularity that they only compete with one another—in spinning off new variations of themselves, n24 or having their often bizarre premises emulated by others. n25

In fact, a whole new genre of television drama—the so-called "police procedural"—emerged over the last several decades to dominate network television programming. Although these shows focus on the most mundane and often distasteful aspects of police work, they nonetheless regularly lead the "top ten" lists for "most watched" television programs. To take a random date from a recent time period: In mid-August 2007, half of the ten most highly rated television shows were crime-related, n26 including episodes of three separate forensic investigation shows, n27 a series devoted to an FBI unit that specializes in finding missing persons (Without a Trace), n28 and another devoted to a detective who concentrated on "crimes that have never been solved" (Cold Case). n29 Given the success of these shows, it is not surprising that in 2008 one of the three major television networks (CBS) announced that, of eleven series that were being renewed for the upcoming year's programming, eight of them were crime-related. n30 It was a wise business decision: By late October 2008, five of the network's crime-related shows were listed in broadcast television's top ten, including three separate forensic investigation shows, and two shows about so-called crime "profilers." n31

By far the most successful of these programs, Crime Scene Investigations, or CSI, concentrates on the often gruesome work of forensic scientists. Indeed, "the original, set in Las Vegas, remained the most watched show on television" well into the first decade of the twenty-first century. n32 As one television reviewer wondered about its surging popularity, "what makes these programs about anal swabs, toenail clippings, and poisoned nipples so popular?" n33 Whatever the basis for its appeal, public fascination with the subject matter continued to grow. The original CSI generated its own "spin-off" program, CSI: Miami within just a few years of being on the air, with a third following shortly thereafter. n34

In addition to CSI, the other crime-related television "franchise," Law & Order, has been a staple of network programming for nearly two decades. Indeed, it not only currently remains a "hit" show, but has achieved the status of "the longest running crime series and second longest running drama series in the history of American broadcast

television," representing "the most successful brand in the history of primetime television." n35 Thus, after some eighteen seasons of broadcasting it still "delivers some of the highest ratings on television." n36

As one media reporter noted in 2001, *Law & Order* was "already the most ubiquitous show on television," when it capitalized on its extraordinary popularity and "spun off not one but two thematically connected series." n37 The spinoffs--*Law & Order: Special Victims Unit* and *Law & Order: Criminal Intent* n38 --themselves quickly became extremely popular and often lead the parent show in ratings. One analyst observed in 2005 that "one notable week last season, one or another 'Law & Order' series aired during 12 of NBC's 22 prime-time hours." n39 At the time the article was written, yet another apparent *Law & Order* spin-off, *Conviction*, created by the same producer, was getting ready to air. n40 *Conviction* focused on the "young, inexperienced and attractive go-getter[] [prosecutors] who are pushed to the limit" in the Manhattan district attorney's office. n41 The popularity and proliferation of the thematically linked shows prompted one television analyst to ask, seemingly in jest, "can an All 'Law and Order' Network be far behind?" n42

In fact, *Law & Order* is in many ways more a programming "empire" than simply a television series. It was estimated in 2005 that NBC, the network that broadcasts the shows, "reportedly logs as much as \$ 1 billion in annual ad sales from 'Law & Order' programming, and counts 'Special Victims Unit' its highest rated show." n43 By 2008, even though it had slipped somewhat from its primary position in the ratings, *Law & Order* was still being described as a "venerable series with a devoted following and a basketful of Emmy nominations--and the cornerstone of a franchise that has generated billions of dollars over the years." n44 Critics expect *Law & Order* will return for a twentieth season, tying it with *Gunsmoke* as the longest running drama in television history. n45

Network programming now represents only a portion of the available television content to which audiences have regular access. Thus, media criminology is almost equally widely disseminated through cable and satellite programming that is received by nearly two-thirds of American households. n46 Not surprisingly, the major networks' enthusiasm for crime-related programming is shared by most of the existing cable networks. For example, one television critic described the unlikely crime-oriented programming of one cable network;

On Lifetime, the channel that branded itself as "television for women," danger and looming death seem to be the unifying concept of the programming. In any given few days, you'll see shows such as those which were described in my on-screen TV guide last week: "After his daughter kills his wife, a California con man weds his wife's sister"; "A deranged gunman kidnaps two teen-age girls"; "Orphaned siblings fall victim to a mentally unstable woman and her husband"; "An assistant district attorney hounds an Oregon woman he suspects has shot her three children"; and "An attorney faces charges of murdering his ex-lover." n47

Another cable network, Showtime, has an extremely successful television series that represents a bizarre merging of a serial killer and crime scene investigator. *Dexter* features a "charming blood spatter expert for the Miami Police Department" n48 who also happens to be the city's most prolific serial killer. As the Showtime network's webpage describes the show's protagonist: "He'll charm fellow officers with a doughnut, wile away a Sunday afternoon with his girlfriend Rita, or chop up a victim and package their body parts in plastic bags." n49 As the trailer for the 2007 season put it, *Dexter*'s continuing struggle is that he must "act relentlessly normal" yet control his insatiable thirst for murder. Indeed, when too much time has passed in between satisfying these murderous urges, *Dexter*'s confessional voiceover acknowledges directly to the viewers that "I really need to kill somebody" and, in the same way, later proudly refers to his gruesome killings as "my beautiful bodies of work." n50

Crime drama is more than merely pervasive on television. It is such a central part of the television industry that its best writers, directors, and most accomplished actors work on crime-related shows. The shows themselves are held in the highest regard by television professionals and critics alike. In the last year of the twentieth century, for example, most of the major Emmy awards were won by crime and law-oriented shows. It was not an anomaly; such shows have a long track record of critical acclaim. For example, *Hill Street Blues*, one of the early police-focused crime dramas, is tied with *L.A. Law* for most Emmy wins for "Outstanding Drama Series." *NYPD Blue*, which followed *Hill Street Blues* in this genre, has the most program nominations in a single award year (twenty-seven nominations in 1994). n51

The Emmy dominance of these kinds of shows has continued well into the twenty-first century. In 2006, for example, *The Sopranos*, a highly successful HBO series about a Mafia-style crime family won the Emmy Awards for "Outstanding Writing for a Drama Series," "Outstanding Directing for a Drama Series," and "Outstanding Drama

Series," n52 and in 2007 it garnered fifteen separate nominations. Monk, a show about an obsessive-compulsive detective has received a total of twelve Emmy nominations over a five year period and has won six times; the three CSI programs have received thirty-seven Emmy nominations and won four in a seven year period; Dexter was nominated three times in 2007, its first year of eligibility; Law & Order: Special Victims Unit has received thirteen nominations and won twice in its eight years of eligibility. n53 In fact, in every year over the last decade (except for 2004), at least one (and usually two) crime dramas have been among the half dozen shows nominated for "Outstanding Drama Series."

In addition to crime drama, a different kind of crime show began airing in the 1990s. A number of so-called "real life" police shows emerged--programs in which actual police officers are shown interrogating citizens, conducting searches and raids, and making arrests. n54 The first and most popular of these shows was entitled, simply, Cops. This show celebrated its twelfth year on television and its 400th episode in 1999--at the time, longevity unmatched by countless other programs that had cost far more to produce and had been promoted with much greater advertising budgets. Cops, as one television commentator put it that year, "has spawned many imitators, but is still the king. This show's conception and ongoing run says all you need to know about America and television." n55

Its success continued. Just eight years later--in 2007--the 700th episode of Cops went on the air. n56 Television critics speculated that the continued longevity of the show spoke to the changed landscape of American television viewing. n57 As one critic noted, families no longer gathered together on Saturday nights to watch network variety shows or sitcoms. n58 Instead, the "viewers who remain often answer the siren call of 'Cops,' watching arrest after arrest in a series that reinforces the notion that order can always be restored." n59

In addition to the ubiquitous crime dramas and the proliferation of so-called "real life" crime programs (such as Cops) on television, crime stories dominate local television newscasts. Indeed, "studies show that crime is the most frequently covered topic on local television and the most likely to be the lead story." n60 Moreover, as two commentators have suggested, "it can be argued that crime news is most important because of [its] dramatic portrayal ... and the potential influence on viewers." n61 Especially when it appears in local news broadcasts, "crime may be depicted as an everyday happening close to home." n62 Similarly, national news coverage concentrates heavily on crime-related topics. For example, during the first half of the 1990s, as crime rates were declining in the United States, the nation's three major networks still reported on crime more than any other single topic during their primetime newscasts. n63 By the end of the decade, crime had risen to the very top of the list of issues covered in network evening news shows. n64 Its dominance was decisive--on average, "1 out of every 10 stories on the network evening news ... dealt with crime," and the percentage remained steady for years. n65

Just as with crime drama, much of the media's excessive focus on crime news is market driven. Not surprisingly, perhaps, news shows have found that their ratings increase when they feature crime stories, especially highly sensationalized cases. For example, when the Columbine High School shootings occurred in Littleton, Colorado, in 1999--a tragedy that left thirteen students dead and many others seriously wounded--the news media provided almost around-the-clock coverage. Yet the viewing audience never became satiated. As one newspaper account reported at the time, "interest by viewers around the nation was reflected in the ratings this week." n66 Indeed, "two networks devoted their newsmagazine programs to the Littleton killings on Wednesday night and scored some of their highest ratings of the television season." n67 For example, "Dateline" had a special hour long broadcast on the killings and scored a 13.2 rating, the best rating for an hour of "Dateline" this season, and the highest ratings NBC has scored on Wednesday at 9 p.m. all season." n68

Some networks have flirted with what would amount to an "all crime all the time" programming format, and there are several that have approximated this over large blocks of programming time. New York Times editorial writer Frank Rich wrote about the apparent media fascination with death and "marathon mourning," which he described as "a hit show-biz formula for generating ratings and newsstand sales." n69 The hit formula included "the New Age vocabulary of 'closure' [and] the ritualistically repeated slo-mo video clips." n70 Rich reminded his readers of the recent "milking of the non-celebrity carnage of Columbine," and then quoted a "Hollywood satirist" to the effect that: "I think I'm going to start a Mourning Channel ... All death all the time." To this, Rich added: "If so, he'll have competitors." n71

The seemingly limitless commercial potential of media "real crime" coverage may have been established in the O.J. Simpson case in the mid-1990s. The Simpson trial became a public obsession that completely dominated media news coverage--so much so that network coverage of the Simpson case alone was almost enough "to put it on the top ten topic list for the entire decade." n72 Beyond the sheer amount of media coverage it generated, sociologist George Lipsitz analyzed the broader commercial impact of the Simpson case:

From start to finish, the O.J. Simpson story demonstrated an eerie engagement with, and an unusual affinity for, the money-making mechanisms within commercial culture. If it was something less than the trial of the century in terms of legal significance, it was certainly the "sale" of the century in terms of its ability to bring together the various apparatuses of advertising, publicity, spectator sports, motion pictures, television and marketing into a unified totality generating money-making opportunities at every turn. n73

Other analysts marveled that, scarcely two years after the criminal verdict in the case, some sixty-odd books had already been written about it, n74 and the extensive media exposure given to the major trial participants during the case had made "celebrities" out of many of them. n75 Although the Simpson case was unusual in terms of the volume of media coverage it garnered, it helped to firmly establish the highly sensationalized criminal case genre as a media mainstay "with legs." There are now long-running quasi-news programs based on literally nothing else.

In fact, however, the first channel devoted exclusively to legal programming pre-dates the Simpson case by many years. Court TV first appeared in the 1980s. Although it eventually came to focus almost exclusively on high profile trials--ones involving celebrities or defendants who, because of the intense media concentration on their cases, had been turned into celebrities, Court TV began as a low budget educational channel in which more typical and mundane cases were covered. Once executives grasped the commercial potential of sensationalized trials, they became the channel's primary focus. Court TV's Chief Executive Henry Schleiff spoke candidly in 2005, reflecting the perspective the network had adopted by then:

It's sort of a perfect storm for Court TV... We kind of come out of [the Scott Peterson trial] and it's like the line in the movie in the storm scene, "She's not going to let us out," only we're not going out, we want to stay in. We're right into [the trial of actor Robert Blake]. Into, I guess, [the trial of record producer Phil Spector]; we've got nothing but celebrities for a while that I can see ... And there's a wonderful opportunity for a Peterson-like trial: that dentist who at the end of the year killed his wife. She died in an identical way to the way the first wife died, which sounds like [a] joke. n76

The market for sensationalized crime coverage persists. Thus, on the eve of the inauguration of a new president in 2009, the Paley Center for Media published a commentary by media analyst Max Robins lamenting the fact that, despite the celebratory mood in the country and the sense that the nation's political atmosphere had finally changed for the better, the "number one news personality among the 25-54 demographic is ... CNN Headline News ambulance chaser Nancy Grace." n77 Robins suggested that "Grace's ratings ascension is evidence that we're back to the good old bad days of cable news--a steady diet of murder and mayhem." n78 Grace, a former prosecutor, is widely known for her strident, emotional tone and her program's exclusive focus on sensational crime stories. She also has a penchant for what Robins called "playing judge, jury, and executioner" in the course of her coverage. n79 He predicted that "some media brass, with an eye on the bottom line, will embrace this return to the scene of the crime as manna from the news gods." n80

In addition to television drama and news coverage, crime dominates other media outlets as well. For example, as one commentator put it, if the United States "could be said to have a national literature, it is crime melodrama." n81 Another observed that, in addition to the prominence of serious crime "in news and current affairs programmes, as well, as in a range of popular entertainments," n82 violent criminality is often central to popular fiction. Indeed, "criminals, psychopaths, and murderers have consistently attracted the attention of writers and readers of all levels of fiction, but it is in popular literature that bloodthirsty murders have been most frequently contemplated." n83

The extremely popular Thomas Harris crime novels illustrate the commercial potential of the genre. In May 1999, for example, what was then the newest book in the series--Hannibal n84 --was the most anticipated release of the summer season. Written as a sequel to *Silence of the Lambs* n85 --a previous Harris novel that had been made into an extremely successful, Academy Award winning film in 1991 n86 --Hannibal was named, of course, after the film's psychopathic main character, the mythically diabolical Hannibal Lecter. "Hannibal the Cannibal," as he is known in the series and to his fans, a demented psychiatrist who, among many other things, was said to have eaten the liver of his

one of his victims and polished the meal off "with fava beans and a little chianti." Lechter emerged in these works of fiction as, in the words of one commentator, "preternatural evil: ever present, ever powerful, and incomprehensible." n87 His incomprehensible evil notwithstanding, so many advance copies of *Hannibal* were ordered that the book garnered a spot on the bestseller list long before it was released--and well before book critics had seen the manuscript.

The enthusiastic reception that greeted *Hannibal* was no anomaly. The New York Times bestseller list for fiction books at the end of the same month *Hannibal* was released--May 1999--was dominated by books about crime and violence. Excluding a Star Wars volume whose popularity was driven by a movie advertising campaign, n88 three of the top four books on the list were about murderers, n89 including one about "a teen girl whose single mother murders a lover," n90 another about a woman who "struggles to free herself of the suspicion that she murdered her husband," n91 and one about a detective who "pursues a woman who is a longtime successful paid killer." n92 Even though murder rates in the United States were returning to historic lows by the end of the 1990s, interest in the topic obviously had not waned at all.

The sheer volume and dramatic pull of media messages about crime-related issues ensure that citizens simply cannot avoid repeated exposure to its criminological lessons. The continued popularity of crime genres and the corresponding profit they generate mean that this saturation is not likely to subside anytime soon. However flawed, this "criminology for the masses" likely forms a primary if not exclusive base of pseudo-knowledge with the potential to influence the way that many citizens make actual criminal justice decisions.

### III. Media "Realism," Active Criminological Learning, and Cultural Penetration

The content of media criminology and the methods by which its lessons are taught have changed in recent years. Its impact has been extended as a result, well beyond the sheer number of television shows, news segments, and other outlets that are devoted to crime-related themes and topics. Several of these developments bear mention. The first is the degree to which media criminology trades on its apparent realism, no matter how farfetched its premises. The line between fact and fiction--real versus imagined threats, practices, and procedures--has become increasingly blurred. In addition, and in a related way, the false lessons of media criminology have become far more detailed and elaborate. The volume of sustained coverage and its seemingly in-depth nature are unprecedented. Moreover, the new media encourages audience members to participate directly in various aspects of their favorite crime-related programs, taking media criminology beyond merely vicarious learning. Perhaps as a consequence of these related developments, media criminology has penetrated deeply into popular culture, where media crime-fighting figures have become iconic and the criminal justice values they represent broadly influential.

Let me address "realism" and the blurring of fact and fiction issue first. The success of *Cops* brings this shift into focus as well as any single program does. The *Cops* brand was initially so notable in part because its "reality TV" format seemed completely authentic and gritty: a show that not only "brings the police blotter to life," but one that "displays all the ugliness and ingenuity that even classic first responder shows" that relied on fictional stories and dramatic actors lacked. n93 The show's apparent realism helped to convince viewers that they were seeing the "real thing." Thus, as one television critic put it: "Dipping into a dozen episodes can teach viewers various ways to spot a suspect, subdue the inebriated and quell mayhem before someone gets hurt." n94

Moreover, the underlying message of *Cops*--that order can always be restored--requires the show to glorify the police and sanitize many of the activities in which they are engaged. Thus, the police in this presumably "realistic" show never err in their judgments: "Since the series always reaches the same crime-doesn't-pay conclusion--no one undeserving is handcuffed--police departments from South Florida to Southern California, not surprisingly, have allowed 'Cops' crews to ride as passenger." n95 And police officers are always shown operating within the strictures of the law: "Epithets? Racial tensions? Excessive force? The videotape either omits or never captures such presumably common extremes." n96

As two social scientists who studied the *Cops* phenomenon wrote: "The emergence of 'reality' television, then, may be partially explained by the increasing need on the part of organizations in particular to manage their 'presentation of self.' Of course, 'infotainment' formats are also highly profitable because they measurably enhance ratings... n97 The *Cops* shows represented a marriage of convenience for two groups--law enforcement and the media--whose mutual interests were obvious: the police were able to manage and improve their media image, garner widespread public support and perhaps greater political and economic leverage, and the media increased profits by elevating ratings.

The *Cops* format has enjoyed continued success and spawned numerous imitators. n98 In fact, an extremely popular variation of the "reality" format has crossed the line from following the police in pursuit of suspected

perpetrators to orchestrating their very own "sting" operations and filming the carefully staged events that unfold. Specifically, the television producers for Dateline NBC's *To Catch a Predator* entice people into committing criminal acts as the viewers at home stand by to enjoy the would-be criminals' inevitable demise. As one commentator described the phenomenon: "Millions tune in each week to watch Dateline NBC's 'To Catch a Predator,' a television expose in which men who engage in sexually explicit internet chat with a decoy teen are interrogated, humiliated, and arrested in dramatic fashion." n99

The program has proven highly controversial and underscores the increasingly blurred line between media entertainment and legitimate law enforcement operations. For example, as one commentator noted, "one of the most troubling aspects of the show is Dateline NBC's relationship with its 'decoys,' *Perverved Justice*"—a watchdog group that is dedicated to deterring would-be pedophiles from "inducing minors into sexual encounters." n100 The group contracts with Dateline NBC to "conduct the stings depicted on the program," its members have apparently been "deputized by law enforcement," and they have done so "while at the same time allegedly receiving a 'consulting fee' of \$ 100,000 from the show." n101

In fact, a federal judge refused to dismiss portions of a wrongful death claim that was filed by the relatives of a Texas prosecutor who committed suicide just before he was to be captured on film in a *To Catch a Predator* episode. n102 The man reportedly shot himself in his home because he knew that "waiting outside the house were members of the cast and crew of the national television news show Dateline NBC," all there to film his arrest for an upcoming *To Catch a Predator* segment. n103 As the judge noted, "apparently unable to face the humiliation of the public spectacle that faced him, [he] took his own life." n104 In denying NBC's motion to dismiss the claims, the judge ruled that

[a] reasonable jury could find that NBC crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement. Rather than merely report on law enforcement's efforts to combat crime, NBC purportedly instigated and then placed itself squarely in the middle of a police operation, pushing the police to engage in tactics that were unnecessary and unwise, solely to generate more dramatic footage for a television show. n105

This same line is being crossed even more explicitly in a new Fox Reality Channel series, *Smile ... You're Under Arrest*. n106 The initial programs featured Maricopa County, Arizona Sheriff Joe Arpaio participating in a format that the show's creator described as "Punk'd meets Cops." n107 Here is how the initial show proceeded:

Television producers, with Mr. Arpaio's enthusiastic assent, sent out notices to scofflaws suggesting that they had won a contest and need only show up to claim a \$ 300 prize. Once there, they are hoodwinked into participating in a fake fashion shows or movie shoots before uniformed deputies come out from behind the curtain and slap bracelets on them. n108

Sheriff Arpaio, no stranger to the media spotlight, was described as "fully engaged in his star turn on Fox Reality." n109 Indeed, as the duped scofflaws were taken into custody on stage at the show's climax, Arpaio rose to the occasion: "'Taken 'em down!' he says into a microphone backstage at the night club." n110

Another variation in the reality show format can be seen in a new 2009 ABC primetime series, *Homeland Security USA*. Although its protagonists are described by the network as "average men and women working against an epic landscape," n111 it has been criticized for only "appearing" to be a "reality" show. Thus, one reviewer described it as having "the look and sound of a documentary without the pesky burden of responsibility—it's homage, not reportage." n112 Here, too, each episode was developed with the "assistance—and censorship (they call it 'prescreening')—of the Department of Homeland Security," resulting in tone and content that was described as "an exclusive, inside look at a recruitment video." n113

In a show that may take the next logical step in mixing pure entertainment and legitimate law enforcement, NBC News has apparently undertaken in its own "investigation" of "possible perpetrators of human rights abuses in several countries," including making accusations against a Rwandan academic who is teaching at an American college. n114



Unaware of any indictment against him "until NBC News arrived on the campus"--accompanied by a camera crew and a Rwandan official who shared the contents of the charges with the president of the college where he worked--the professor was "confronted with cameras and microphones" in his classroom after he had finished teaching a class. n115 A Human Rights Watch official characterized these activities as "really highly unusual," n116 and the Department of Homeland Security went even further, noting that "a program of this kind could negatively impact law enforcement's ability to investigate and bring cases against [perpetrators]." n117

The "reality" television crime shows have several things in common. There is a sanitized--even glorified--portrayal of law enforcement personnel and practices, with little or none of their problematic behavior included. Exactly like their dramatic counterparts, these shows present alleged perpetrators absent background or contextual information that would allow viewers to begin to understand them. In addition, they have now clearly moved beyond detecting crime and apprehending its perpetrators to directly administering humiliating punishment to whomever appears guilty. Indeed, the emotional "highlight" of the shows is the inevitable undoing of the perpetrators, who are typically physically dominated and otherwise humiliated or degraded on-screen before each segment comes to an end. Obviously, the shows also give viewers the feeling that they are being given the unfiltered or "raw" truth about crime and the criminal justice system.

Beyond these "reality" formats, other forms of media criminology blur the line between fact and fiction in different ways. Some represent actual (or what appear to be actual) criminal justice practices in unrealistic ways, such as "reality" shows that never depict improper police behavior or incorrect or unjust outcomes arrived at through unreliable methods. Others portray clearly incredible crime-related procedures "as if" they were real. Yet most of the programs continue to misleadingly trade on their apparent realism, at least enough believability that audience members find them credible enough to watch. Thus, the shows regularly tout their "street cred" and law enforcement bona fides by publicizing the expert story consultants they employ, and seeking complimentary characterizations as "raw" and "gritty." The success of the highly popular Law and Order series, for example, is attributed in part to its "distinct ripped from the headlines format" n118 and "gripping headline-inspired storylines." n119

If the success of Law & Order can be attributed to its "ripped from the headlines" authenticity, other crime shows have succeeded with truly incredible premises that are nonetheless portrayed as "realistic." In this way, of course, the shows regularly push viewers past the boundary that separates the factual and fantastical. For example, one such successful series--Profiler--features a protagonist who purportedly solves crimes by "feeling the vibrations at the crime scene." n120 A website that advertises its DVDs described the show's main character as "a female forensic psychologist with a very powerful and unique gift that allows her to see past the physical evidence and get a glimpse into the mind of the criminal, as well as the victim and visualize the crime in a way not many others can." Once her gift was eventually recognized, she was asked to join "a team of investigative professionals ... the Violent Crimes Task Force (VCTF)." n121 Despite this extraordinary premise, the show was first televised in 1996 and was successful enough to last until 2000 on network television.

Indeed, Profiler's success inspired a direct imitator--Medium--which ratcheted up the claim of realism. Thus, Medium's main character not only "sees crimes as they happened," but she is also said to be "based on a real person." The real person in question, Allison DuBois, is described as a "bright light" in the "medium business" because she has outspokenly suggested that "there are a lot of charlatans" in the "field" of "research medium and criminal profiler." n122 The publicity for Medium does not explain exactly what a "research medium" is or what in particular distinguishes someone as a charlatan in this line of work. Nonetheless, Ms. DuBois, the inspiration for the series, is said to have had "relentless and brutal visions of dead people or murderers" that police departments around the country supposedly used to solve cases. n123

In a clever twist of this apparently popular premise, CBS aired a new series in Fall 2008, The Mentalist, whose protagonist works as an "independent consultant" for the fictitious "California Bureau of Investigation." n124 His "remarkable track record for solving serious crimes" is said to derive from his "razor sharp skills of observation." n125 However, the "psychic-profiler" twist in the show is based on its main character's notorious reputation--specifically, his "semi-celebrity past as a psychic medium," but one "whose paranormal abilities he now admits he feigned." n126 Despite this checkered past, his "role in cracking a series of tough, high profile cases" has made him "greatly valued by his fellow agents." n127 The show's advance advertising was successful in generating a large audience for its debut. Newspapers reported that "ratings for the new crime show The Mentalist helped CBS eke out a victory on Tuesday as the most-watched network." n128 According to Nielsen's ratings estimates, the show "attracted 15.5 million viewers" in its first broadcast, appearing in a time slot in between two other CBS prime time crime shows, NCIS (which itself "garnered its largest premiere in six seasons," with some 17.7 million viewers), and Without a Trace (which had 11.4 million viewers in the following time slot). n129



A related change in the nature and content of media criminology involves the amount of seemingly in-depth coverage to which the public now has access, well beyond anything available even a decade ago. For example, over the last several years, MSNBC emerged as the nation's fastest growing cable network. n130 Commentators have attributed much of the network's recent success to its politically progressive news shows. n131 However, MSNBC also began airing a steady diet of crime-and-punishment-oriented programs that appear to have contributed to its growing popularity among viewers. n132 Many of these shows focus on notorious murders, typically contain extremely graphic "reenactments" of what are often gruesome or salacious crimes, and underscore their horrible impact through lengthy, emotional interviews with surviving family members and friends of the victims. If defendants or perpetrators appear at all in these episodes, it is usually only briefly--at the time of arrest, sitting in the courtroom at the trial, or in a prison cell after conviction. The predictable exceptions occur when defendants present themselves as particularly bizarre, openly remorseless, or chillingly matter-of-fact.

MSNBC's programs are advertised in on-air "trailers" as well as website text with graphic and sensationalistic language that matches their themes and content. The volume of such programming on what is ostensibly a legitimate news network is unprecedented. For example, television viewers who tuned in to MSNBC on May 11, 2008--Mother's Day that year--were treated to *Massacre at Closing Time* (a show that featured a reenactment of what was described as "a brutal seven-person massacre in a quiet Chicago suburb," allegedly perpetrated by two young men for "the thrill of it," and included emotional interviews with the victims' now grown daughters who had been orphaned by the tragedy). That program was followed by another show, entitled *Murder on Lover's Lane* (about crimes perpetrated by someone dubbed "The Monster of Florence" whose killings were described as so horrible "the devil himself might be behind them"), and then *Dark Heart, Iron Hand* (about a perpetrator who was described as "8 times a killer" in a televised trailer for the show that invited the audience to "meet the most brutal serial killer you've never heard of"). In the course of the day, a number of crime-related offerings that the network had scheduled for later in the week were advertised on air with this tag line: "They don't think like you. They don't act like you ... From beginning to end, these brains are bad." Various individual shows were then advertised from MSNBC's "Doc Block" lineup--the several hour block of documentary films that is part of the network's regular late night, crime-oriented programming--to be aired in the days ahead.

Direct crime-related programming is not the network's only contribution to media criminology. In addition to the shows that focus on gruesome and sensational individual crimes, MSNBC supplements its playlist with a series of related documentaries depicting some of the nation's most notorious prisons, often featuring their most extreme or frightening prisoners. In fact, although the series is ostensibly about the prisons, the programs rarely dwell on conditions of confinement or the psychological consequences of incarceration. Instead, the emphasis is typically on the most bizarre and fearsome inmates housed inside these facilities (inmates who are often depicted as surprisingly well adjusted to their harsh surroundings). n133 In fact, MSNBC adopted a practice of airing what it called "Lockup Marathons" on holidays, presumably when people with little else to do could spend most of the day in front of their televisions. n134

The Lockup series was so successful during its first several years that it spawned another series, *Lockup Raw*, which began airing in early 2008. It was described by its producers as featuring "never before aired footage of some of Lockup's most memorable inmates." n135 Four of the episodes included "dramatic accounts" from producers who described "what it's like to be locked in cells for interviews with killers" who, it was said, were so dangerous that the filmmakers felt they had "risked their own personal safety" in order to talk to them in person. n136 The first four episodes were titled: "Hell in a Cell," "Violence Behind Bars," "The Convict Code," and "Criminal Minds." n137

Although MSNBC has devoted a substantial portion of its television line-up to crime and prisons, another network finally made the leap to around-the-clock criminal justice programming. As a newspaper headline put it in late 2007, "Discovery Hope for Payoff on Crime Channel." n138 Indeed, the Discovery Communications company (parent company to several other cable channels, including Planet Green, Discovery Kids, The Learning Channel, and The Military Channel, and once in partnership with the New York Times) launched an "all crime, all the time" channel. A press report described the channel's programming this way:

To program the new channel, Discovery plans to draw on hundreds of hours of crime shows in its library, such as "The FBI Files" and "Most Evil," the company said. Discovery is also in talks with CBS, to acquire episodes of "48 Hours," and NBC Universal, to acquire episodes of "Dateline NBC." Discovery plans to produce 200 hours of original programming next year, said John Ford, chief executive of the channel. n139

The motivation for the creation of the new "all crime all the time" channel was straightforward. Company executives reported that "within months" of shifting crime-related programming into one of their underperforming channels, they discovered that "Nielsen ratings rose." n140 As a result, they quickly concluded that "the channel could make a business in the crime niche." n141 As one of them put it, the new all-crime network embodied a "programming vision that viewers could connect with, that could be a strong economic engine," one that would allow the channel to "be the home base for a huge number of people around America who love this content." n142

Citizens can now watch enough of this kind of programming--all of it couched in "realistic" (even "documentary") terms--to begin to feel like genuine experts about a topic with which they will have been given no actual systematic knowledge and had no direct contact whatsoever. In addition, however, avid consumers of media criminology are also the beneficiaries of new technology that both allows them to do extra "studying" on their own and encourages them to take a more active role in the "learning" process. For example, like many other media outlets, Investigation Discovery created its own crime-related website, which advertises the channel as "Investigation Discovery: Hollywood Crimes, Forensics, Murderers," n143 and gives visitors opportunities to engage more deeply with a range of crime-related subject matter. They are invited to calculate their "investigation IQ" (for example, to "test [their] knowledge of forensic entomology--the use of insect evidence to solve crime"), check in on that day's "criminal report daily blog" to "get [their] daily dose of the latest and most probing [police] investigations" currently underway around the country, and watch one of the numerous online videos that are available. n144 It also allows visitors to read in-depth articles on things like "how autopsies work," or see and hear about what is described as "Dr. Stone's 'Most Evil Scale'" (presented "in its entirety" and, it turns out, narrated in Dr. Stone's own voice!). n145

Many other crime-oriented networks and programs also have their own websites that they use in similar ways--to not only extend their fan base but also to intensify the level of viewer engagement that citizens can have with a range of crime-and-punishment-related issues and practices. For example, although the previously described Court TV network continued to be operated as part of Turner Entertainment Networks and owned by Time Warner, in 2007, Court TV became "truTV"--complete with a new trademarked motto, "Not Reality. Actuality." TruTV describes itself as the "destination for real-life stories told from an exciting and dramatic first-person perspective" that gives viewers "access to places and situations they can't normally experience." n146 In addition to its extensive crime-related programming, truTV maintains a "Crime Library" on its website, which it describes as "a collection of more than 1000 nonfiction feature stories and photo galleries relating to crime, criminals, trials, forensics and criminal profiling by prominent writers." The website library's "card catalogue" consists of sections devoted to specific topics under the headings of "Serial Killer," "Notorious Murders," "Criminal Mind," "Terrorists & Spies," "Gangsters," and "Most Controversial" crime stories. n147

Another popular cable crime drama, *Psych*, which started out as the most watched show on cable television, also made efforts to establish a more "personal" connection with its audience. n148 Viewers of the show were encouraged to "sign up for *Psych* mobile alerts" that promised them weekly questions designed to "test [their] skills of observation," so-called "character updates" from one of the show's two main characters, and "tune-in reminders" sent directly to their mobile phone numbers. n149 What's more, the "Spanish version of the *Psych* theme song, 'Lights, Camera ... Homicide'" had apparently "caused such a stir" that it was being made "available as a FREE ringtone!" n150

In addition to the crime show-related websites, USA Today reported that *CSI* had made "a move that brings interactivity to new heights." n151 Specifically, the recently opened National Museum of Crime & Punishment is designed to "teach visitors the tricks of the crime-scene investigators (plus the actors on all those *CSI* shows)." n152 Indeed, free workshops were held "in the museum's mock crime-scene lab, where graduate students from George Washington University will demonstrate fingerprinting, evidence collection, identification via dental records, and other [crime-scene investigator] skills" featured on *CSI*. n153

The cable television series *Dexter* also maintains its own website, which contains show-related information and invites fans to experience the series at a more participatory level. Thus, visitors to the *Dexter* website are invited to click an "investigate now" button that promises them "all the gory details about *Dexter*'s victims," including "who they are, why *Dexter* killed them, and how *Dexter* stalked them down." n154 The *Dexter* website also has an interactive "Community" page that includes a chat room, message board, and "blog buzz" section, complete with direct links to Wikipedia and other sites such as Facebook. n155 In addition, it contains a page that allows viewers to sign up for "email and wireless updates" so that they can "stay in the loop with *Dexter*" and receive "scheduling reminders, episode previews, and facts about the show," n156 as well as a direct link to the "*Dexter* Store," where fans can purchase "Power-Saw to the People" posters and *Dexter* "slice of life" tee shirts, among other things. n157

In addition to its interactive and participatory website, Dexter's sardonically macabre marketing ploys underscore the extent to which crime drama has penetrated deeply into our popular culture. For example, the cable network where the show appears, Showtime, sponsored the creation of what Business Wire described as "unforgettable scenes in landmark locations" as part of a "Dexter's Red Fountains" advertising event. n158 In fact, on September 27, 2007, the network unveiled a series of "artistic water exhibits" that involved dying water in existing or specially constructed large fountains a blood red color--simulating fountains of blood--in open public spaces in fourteen cities around the United States. n159 The fountains--dubbed "Dexter's Red Fountains" by the network--were all "cordoned off" with what appeared to be official police "crime scene" yellow tape, and were presided over by "street teams ... adorned in Dexter forensic lab coats," who stood by, distributing show-related paraphernalia, "touting the season premiere of Dexter." n160

Indeed, Showtime promoted Dexter himself as "America's favorite serial killer," and the show's ratings seemed to confirm the claim. Showtime reported that Dexter was its "most popular original series," with an average weekly viewership of 2.4 million persons. In fact, when episodes of Dexter ran on the CBS network in February through May 2008, the size of the audience almost tripled, with each episode averaging 7.1 million viewers.

An even more ambitious marketing strategy was used to publicize the start of the show's next season. As the New York Times reported, Dexter's 2008 nationwide advertising campaign involved simulated cover pages that were published in a dozen or so mainstream magazines. n161 In each of the full page, realistic ads, the serial killer protagonist was featured as a "serial cover boy"--made to look as though he actually appeared on each of the magazine covers, ranging from Wired to The New Yorker. The glossy full-page ads were distinguished from the real thing only by their placement in the magazines--either on the back covers or as part of a several page advertising spread contained inside--and the fact that they "all are labeled with the word 'advertisement' in small type atop each page." n162 One magazine company executive said that the campaign was "all very fun" and "shouldn't confuse the reader," while another one commented that the ads were simply intended "to connect with the reader in a resonant way." n163

Of course, the campaign also celebrated the fact that the Dexter brand had become part of the mainstream popular culture. As one of Showtime's marketing executives pointed out, the new campaign was designed to suggest that the serial killer character had reached the status of "a celebrity, part of popular culture, a cover boy." n164 As such, Dexter's popular culture status seemed to normalize the vigilantism at the core of the show and, among other things, legitimize the premise that killers deserve to be killed. n165

The impact of media criminology's normalizing and even glorifying of law-and-order perspectives on the mainstream popular culture is difficult to assess. However, its powerful influence may be reflected in the dramatic rise in popularity of the "criminal justice" major in American colleges and universities. By the end of the 1990s, it had become the fastest growing major in the country. Some of the motivation for this newly created interest was economic, reflecting the greatly improved economic status of criminal justice professionals as the crime and punishment industry became more established, respected, and profitable. But much of this new-found popularity also appeared to be tied in some ways to the pervasiveness of media criminology and the broad cultural acceptance of the mindset and value system that it represents.

Indeed, as one 1998 report conceded: "specialists in criminal justice are quick to admit that their field has also benefited from movies, television and widely covered trials like that of O.J. Simpson." n166 One educator was quoted as saying that "the largest single impact on criminal justice enrollment in the past 10 years was 'Silence of the Lambs' ... ." n167 This combination of media and economic forces had a powerful effect on turn-of-the-century college educators. Indeed, "with all the interest in crime," criminal justice studies was described as having "taken on a gold rush feel" in these years, with college administrators pressuring their faculty to start criminal justice programs "to respond to the market demand." n168

Once set in motion, these trends became mutually reinforcing, further insinuating the media's view of criminal justice "reality" into actual law enforcement functions, and increasingly distorting the public's view of "truth." For example, the media's role in legitimating criminal justice occupations, elevating their status, and enhancing the desirability of the college major also helped to strengthen its relationship with the law enforcement establishment, raising concerns in some quarters over the beginning of a "symbiotic transformation underway regarding the roles played by police and media agents." n169 In particular, Hallett and Powell elaborated:

We had police agencies involved in what was formerly a strictly media function (i.e., editing) and media officials increasingly willing to exert their presence in a law enforcement capacity (i.e., cameramen offering to physically help out police officer/actors if they get into trouble) ... It is common nowadays, for example, to have local television news divisions inviting members of the public to "call channel 2" if they see something suspicious--rather than call the police. n170

Among other things, the amount of access that the producers of these shows often have been granted to previously off-limits police practices may have fundamentally altered the relationship between the criminal justice system and the media. For example, executive producers of CSI got ideas for episodes by palling around with actual police investigators and dropping in on crime labs to talk with crime scene and evidence technicians. n171 The blurring of the lines between the professions was not lost on the police. As one of the crime lab technicians was quoted telling several CSI producers, "Explaining a crime scene to a jury is almost like writing a movie script. You have your beginning, your high point--the shooting--and your denouement." To which one of the producers gushed, "That is why you guys are heroes! You're creating order out of chaos." n172

But increasingly the police (and prosecutors) are creating order out of chaos in front of juries who think they have seen these things done many times before and know exactly how the story should end. That is, they believe they have watched the "police" directly on the job, and witnessed countless "crime" scripts played out and "crime scenes" scoured for the telling clues. They have repeatedly seen what they believe are normative "patterns" of criminal behavior on display and have ostensibly observed the mind and motives of the typical violent "criminal" relentlessly probed. Of course, the heavy dose of police-directed inspiration in the construction of the shows, and their influence over the editing process mean that even the supposedly crime-related "reality" shows are less "raw" than "cooked." Audiences are getting their education from programs in which, among other things, any questionable, gratuitously violent, or otherwise problematic incidents are routinely edited out, unreliable or faulty procedures carefully omitted, and nuanced contextual explanations for crime scrupulously avoided. The public is left with false images of both the police and the criminals they pursue in crime drama as well as "reality" cop shows, and its core criminological knowledge base has been degraded as a result.

Thus, notwithstanding its popular culture cache, the all-pervasive media criminology--including a continued chronic disregard for the distinction between fact and fiction and an unquestioned faith in law enforcement to manage the problem of crime--has undercut rather than enhanced the public's genuine understanding of these issues. A core of criminological "pop" or pseudo-knowledge has grown larger, more sustained and participatory, and become a fixture in mainstream culture--without leaving citizens in general any more informed about criminal justice issues.

#### IV. Media Lesson Plans: Criminological Mis-Education and the Death Penalty

Despite long-standing concerns about the power of the media to shape citizens' views of crime and punishment, n173 their influence appears only to have broadened and deepened over the years. Scholars and critics have advanced the commonsense proposition that heavy media consumers "will be more likely to perceive the real world in ways that reflect the most stable and recurrent patterns of portrayals" to which they are repeatedly exposed. n174 Yet, media criminology is now so widely and effectively disseminated that most persons--including most voters and jurors--can be considered heavy consumers by almost any measure. The flawed lessons of this "virtual discipline" are a pervasive source of public mis-education.

As I noted earlier, problematic crime-related media effects are unusually strong (and potentially more pernicious) because readers and viewers have access to so few alternative sources of information. Even persons who are the victims of crime, or are closely related to those who have been victimized, learn little or nothing about its causes. Most graduate degrees in media criminology are thus being awarded to persons who lack other ways to obtain knowledge with which to truly understand criminality. In addition, however, the media's criminological lessons are depicted as highly "realistic" and complete, that is, as if there was nothing more to say or know about them. As Thomas Mathiesen observed, television news and drama, especially, create the impression that they are "depicting the truth about crime. How can you doubt your own eyes?" n175 Indeed, a "generalized consciousness emanates: such is crime; such is, in fact, the world." n176 Moreover, many forms of media are so compelling that they appear to undermine the audience's natural tendency to critically scrutinize the messages that are being conveyed. The storylines and dramatic techniques are engaging enough that they may suppress the implicit "counterarguing" that ordinarily would take place when people are exposed to potentially persuasive communications. n177

These pervasive, seemingly realistic, categorically delivered criminological messages are likely to have real world consequences. By giving citizens, voters, and jurors flawed frameworks for understanding a whole range of important crime-and-punishment-related issues, media criminology may undermine the nature and quality of their thinking about crime and their criminal justice decision making. Moreover, as I suggested at the outset of this Article, these negative influences are likely to be especially powerful and problematic in death penalty cases. In this final section, I address some of the reasons why this might be so.

Much has been made of the role of fear in contemporary American society, and rightly so. Sociologists have observed that many citizens now live in a "culture of fear,"<sup>n178</sup> and other commentators have identified "ecologies of fear" where people's lives are especially dominated by these concerns.<sup>n179</sup> The commercial interests that create and maintain media criminology are advanced by this emphasis on fear-arousing sensationalism. That is, in order to attract the widest possible audiences, crime-related news and drama typically focus on the most graphic, salacious, and bizarre details of whatever story is being told.<sup>n180</sup> By generating a potent combination of fear, morbid curiosity, and anger the media compel readers, listeners, and viewers to pay attention.<sup>n181</sup> Once afraid and enraged, a highly engaged audience is more likely to stay "tuned in" until their anxieties are allayed and their fury dissipated (usually through the application of an especially forceful and definitive law enforcement response).

In fact, media criminology may have succeeded so well in this regard that it has helped transform the surrounding cultural landscape. Thus, David Garland contends that the fear of crime has become "the seemingly perennial fear of the late modern Western world," so powerful and pervasive that it has become a "prominent cultural theme" in contemporary society.<sup>n182</sup> Media criminology contributes directly to this prominent cultural theme by exaggerating the apparent magnitude of the crime problem, both by misrepresenting the frequency of criminal victimization (suggesting to audience members that their chances of being a crime victim are greater than, in fact, they are) and overestimating the extent to which serious and sensationalistic violent crime--the primary focus of news coverage and crime drama--occurs.<sup>n183</sup> Not surprisingly, studies have shown that viewing local television news--the outlet on which citizens rely for most of their news--increases citizens' "perceived risk of crime" and their belief that "crime is an important local problem."<sup>n184</sup>

Their impact on the larger culture notwithstanding, all aspects of the media's pervasive fear-mongering and anger-generating are problematic for the fair administration of the death penalty. Intense public fear over violent crime, anxiety over the perceived threat of victimization, and fury directed at perpetrators can drive up support for the death penalty in general. Because of the way that homicide is overrepresented in media portrayals of crime, citizens receive a distorted sense of the level of societal threat that it, in particular, represents.<sup>n185</sup> The over-representation of homicide is problematic also because of the way that the death penalty--as the most forceful and definitive law enforcement response possible--is explicitly offered or implicitly suggested as the only appropriate way to address these worst possible crimes.

In addition to amplifying fears about potentially capital crimes and endorsing the most severe punishments as the most appropriate response,<sup>n186</sup> media criminology repeatedly reinforces a dominant cultural narrative about the origins of violent criminality--one that implies something about the nature of the persons who perpetrate such crimes and the societal policies that are needed to properly address them. Elsewhere I have termed this a "crime master narrative," and suggested that it depicts criminal behavior "as entirely the product of [the individual perpetrator's] free and autonomous choice-making, unencumbered by past history or present circumstances."<sup>n187</sup> Media criminology fully embraces and consistently legitimates the crime master narrative, effectively teaching the public its core causal lesson--that individuals alone are responsible for violent crime, and that their extreme behavior stems entirely from deep-seated personal traits--depravity, narcissism, psychopathology, and the like.<sup>n188</sup>

In this sense, media criminology operates with an implicit model of human nature akin to what social psychologists have termed "entity theory"--the notion that behavior emanates from human qualities and tendencies that are largely fixed and that people possess in varying amounts.<sup>n189</sup> Research suggests that persons who endorse "entity theory" views conversely are less likely to consider situational or contextual information in making judgments about others.<sup>n190</sup> Not surprisingly, this perspective on human nature leads to greater punitiveness in general,<sup>n191</sup> and to an increased likelihood of imposing the death penalty in particular.<sup>n192</sup>

On the other hand, social contextual or structural explanations for crime are virtually absent from media criminology.<sup>n193</sup> They rarely if ever appear in the day-to-day news reporting about local crimes that dominates regional newspapers, and are similarly ignored in local or national television news broadcasts. Such explanations also

are missing from crime-related entertainment media (especially the ubiquitous television crime drama). As Murray Lee explained:

The media rarely acknowledge complicated and contingent processes by which events develop out of often mundane situations that produce them. Thus, it is the elevated event, pure event, decontextualized and dehistoricized, which is flashed and reflected, often fleetingly, on to the psyche of the "news consuming" public or community. n194

Thus, whatever else citizens might take from the media criminology curriculum to which they are exposed, they repeatedly learn that violent criminality stems from the morally blameworthy choices of its individual perpetrators. These bad acts are the simple but condemnable extensions of the evil or pathology that dwells within the bad people who perform them. In Thomas Harris's chilling *Silence of the Lambs*, for example, Hannibal Lecter's fearsomeness is underscored by his assertion of precisely this view. When Officer Starling seeks some other form of explanation, he mocks this attempt at contextualizing his behavior by taunting her:

Nothing happened to me, Officer Starling. I happened. You can't reduce me to a set of influences. You've given up good and evil for behaviorism, Officer Starling. You've got everything in moral dignity pants--nothing is ever anybody's fault. Look at me, Officer Starling. Can you stand to say I'm evil? Am I evil, Officer Starling? n195

In addition, however, beyond reinforcing the master crime narrative by individualizing and decontextualizing crime, media criminology consistently dehumanizes and demonizes perpetrators and effectively exoticizes their criminality. This is accomplished in a variety of ways. Some of it comes about through the pervasive use of degrading and derogatory language to refer to suspects and perpetrators. n196 It is also accomplished through a persistent focus on the most obviously disturbed lawbreakers and the disproportionate depiction of the most bizarre kinds of crimes. For example, media criminology is replete with shorthand expressions that have been concocted to supposedly describe certain "types" of extreme killers, allegedly capturing the frightening essences of the persons who commit these especially heinous crimes. Thus, there are "thrill killers," n197 "stone killers," n198 "psycho killers," n199 "rampage killers" n200 and, of course, "natural born killers." n201 The invented terminology is so evocative that the labels themselves require no further explanation; it is assumed (correctly) that the audience can easily conjure what they must mean. Media commentators employ these terms without bothering to precisely define them, let alone including any systematic (rather than anecdotal) or scientifically grounded discussions of their origins or prevalence. The bogus typologies that they represent help to reinforce the persistent message that nothing beyond the inherent evil or pathology of the perpetrators themselves is at work.

Moreover, most of the media's extended treatments or "analyses" of violent criminality reflect the same premises as those encapsulated by the shorthand labels used to describe the worst of it. Thus, for example, there is no mistaking the core message lurking within MSNBC's extensive, in-depth crime and prison programming--there are terrifying predators roaming the country, they engage in the most heinous crimes imaginable for the vilest of motives (or no apparent motive at all), and the nation's prisons are struggling to house a seemingly endless supply of these evil misfits. In this way, media criminology helps make the perpetrators of crime much easier to fear and despise, rendering them fit targets of widespread public anger and little else.

In some instances, the "demonization" of criminality is nearly literal. Indeed, the term "monster" is now used explicitly and with some regularity in media commentaries and published accounts of crime. n202 As Edward Ingebreetsen has pointed out, the term "directs otherwise unacceptable excesses of violence and passion toward sanctioned political ends," in part because defining someone as a "monster" renders them "beyond any need for human courtesy or decency." n203 Of course, the term "monster" (and the "rhetoric of monstrosity" as Ingebreetsen puts it), carries surplus meaning: "The heinousness of the crime or criminal is buttressed by appealing to outside agency. Allusions are made to supernaturalist mythologies, cinematic metaphors and literary characters the (alleged) killer is thought to embody." n204

In substantive terms, then, media criminology includes the repeated, consistent contention that criminals are not only fundamentally different from others--in terms of the behavior in which they have engaged--but also that they are essentially and even inherently so. Thus, the perpetrators of violent crime may be characterized as wild and animalistic, n205 genetic misfits who are born to pillage and plunder, n206 psychopathological or psychologically defective miscreants, n207 or as just plain evil. n208

Reducing violent criminality to these constituent terms clearly "serves ideologically weighted functions" that include, as Joseph Gixti put it, "providing challenging reminders about the need for constant vigilance, or offering reassurance about the ultimate rightness of law-enforcement structures as guardians and embodiments of the social and moral order." n209 Perpetrators of extreme forms of violence are commonly represented in media criminology as "neither civilized nor really human," in ways that "stress their monstrosity so as to perceive them as belonging to the realm of the other." n210

Of course, these flawed media frameworks are likely to have real consequences when the persons who are immersed in them are asked to make judgments about crime-related policies or participate in criminal justice decision making. One social scientist who has studied the media's tendency to mis-educate audiences about these issues has even suggested that "for students of criminology, who are exposed to the individualistic explanations of crime offered by entertainment television, it may take several intensive sociology courses to counteract these media-created impressions." n211 In actual criminal cases, however, jurors are regularly called upon to perform their duties without the benefit of this intensive, counteracting coursework. Instead, media criminology and its pervasive stereotypes may distort their processing of evidence and compromise the life-altering decisions that they are required to make. In general, inaccurate stereotypes, flawed causal analyses, and dehumanizing and demonizing images may undermine the quality of justice routinely dispensed.

In death penalty cases, the myths and misinformation represent a more significant threat because of their effect on the capital jury's unique and critically important sentencing function. As Justices Marshall and Brennan once noted, the risk of media bias is greater in capital cases because "the jury wears an altogether different hat when it sits as sentencer. It must make a moral decision whether a defendant already found guilty deserves to die for his crime." n212 Yet, the biased and simplistic lessons of media criminology may distort the conceptual frameworks that are available to capital jurors and shift the norms of punishment they feel compelled to apply. More specifically, if the stereotypes and flawed lessons that characterize media criminology go unchallenged in a capital case, they may jeopardize the jury's ability to engage in the kind of individualized sentencing that is supposed to be the hallmark of modern death penalty jurisprudence. n213

For many years now, mitigation--typically, evidence about the client's background, social history, and present life circumstances--has taken "center stage in death penalty cases as potentially the only way defense counsel could humanize the client and save his life." n214 The mitigating counter-narrative that is typically employed stands in stark contrast to the simplistic and misleading stereotypes that are so prevalent in media lesson plans to which many capital jurors have likely been exposed. As one death penalty lawyer has put it, although there is "no blueprint" for gathering, analyzing, and presenting the kind of mitigation that is likely to save a client's life, defense attorneys strive to find whatever "compelling details [have] the potential to transform the prosecution's 'monsters' and 'cold-blooded killers' into tragic figures for whom juries could find mercy." n215 Yet the prosecution's monsters and cold-blooded killers will be all too familiar to many jurors, who have already repeatedly encountered them in the media. Capital defendants are easily mis-portrayed in the courtroom to jurors predisposed to see them that way, namely, as protagonists in the crime master narrative, and exactly the kinds of persons whose nature a pervasive media criminology has presumed to "explain."

In modern capital jurisprudence, precisely because the penalty phase of a capital case requires issues of blameworthiness and culpability to be explicitly addressed, jurors are legally mandated to consider evidence about the defendant's social history, past circumstances, and relevant social context. Capital cases are supposed to focus on the background and character of the defendant in the broadest possible terms--typically making who he is and why absolutely central to the jury's decision-making process. Yet, the terms of the struggle between opposing counsel over the nature and relevance of the specific social forces that shaped the defendant's life course, the causes of his past criminality, and even his chances for a successful and perhaps productive future life in prison may be badly distorted by the media misinformation to which so many jurors have been exposed.

Thus, the pervasiveness of the media criminology I have described in the preceding pages is fundamentally at odds with the kind of mitigating counter-narrative that is designed to broaden the jury's understanding of the defendant and



the life he has lived. This counter-narrative is one that few jurors are likely to have explicitly encountered before, and certainly not in the mass media lesson plans to which they have been exposed. Instead, by discounting or ignoring social factors and blaming perpetrators alone for their actions, media criminology implicitly "insists that individuals have complete control over who and what they are, and therefore, are entirely accountable and responsible for their behavior." n216 This, correspondingly, "endorses the principle that focusing on the offender, rather than social conditions or circumstances, is the proper method of confronting the problem of homicide." n217

On the other hand, not surprisingly, the more that citizens can acknowledge the role of variables such as poverty, maltreatment, and discrimination in crime causation--precisely the framework of understanding that is lacking from media criminology--"the less likely they [are] to be punitive, and the less likely to support capital punishment." n218 In order to facilitate this recognition, however, jurors must be "re-educated" and the erroneous criminological lessons essentially unlearned. Thus, an effective mitigating counter-narrative must necessarily debunk at least some of the worst stereotypes and misconceptions that are likely to linger from past media exposure. Otherwise, jurors may cling to an oversimplified and inaccurate view--the only one to which they have had access--and to favor the harsh punishments it both implies and seems to sanction. n219

In this regard--and consistent with the crime master narrative to which it significantly contributes--media criminology can increase the emotional distance or "empathic divide" that exists between the perpetrators of crime and the persons who judge them. n220 Elsewhere I have suggested that the empathic divide is particularly broad and deep when defendants of color are judged by white jurors, a dynamic that is likely to occur more often in death penalty cases because of the way in which death qualification disproportionately eliminates non-whites from participating on capital juries. n221 But a pervasive media criminology and its repetitive and consistent lessons help to create and maintain the empathic divide between jurors and defendants, long before they meet in the courtroom. Although the media-generated divide is in some ways independent of racial dynamics of the case, those dynamics can certainly exacerbate and increase the psychological distance between jurors and defendants. n222

As I have noted, in addition to so completely internalizing the causes of crime and demonizing its perpetrators, media criminology wholeheartedly embraces a conventional law enforcement approach to crime control, one in which the death penalty becomes the logical last step in an escalating arsenal of what are portrayed as entirely appropriate and largely necessary societal responses. Heightened punitiveness is made to appear so commonsensical that it becomes reflexive and matter-of-fact, absolutely vital to the preservation of social order and the maintenance of public safety. Although media criminology may increasingly depict the failings and foibles of individual law enforcement personnel, n223 it nonetheless still fully and unquestioningly embraces a traditional approach to crime control that is exclusively punishment-oriented. Thus, media criminology implies a corresponding penology: crime precipitates punishment, and the most serious crime must be met with the most severe punishment, to the exclusion of any alternative approach. n224

In fact, in spite of its bizarre premise, the successful cable network series *Dexter* epitomizes the media's vengeful, punitive logic. The conventional message at the core of the program is in large part what makes its gruesomeness and "serial-killer-as-hero" theme palatable to viewers: *Dexter* is committed to only "stalking and murdering the guilty." n225 This is the very element that renders the show--despite its self-conscious "edginess"--fundamentally consistent with all other mainstream television crime dramas. Thus, according to *Dexter*'s repeatedly stated ethos, "killing must serve a purpose" (that is, a law enforcement purpose). In this way, viewers are told, *Dexter* "channels his urge to kill into something productive--he kills people who deserve it," including drug dealers (some of whom are labeled on the show's website as "illegals"), pimps, child molesters--most (but not all) of whom have committed murder themselves. n226 As *Dexter* puts it: "Live a good life, and society will take care of you. But if society drops the ball, then someone else has to pick up the slack. That's where I come in." n227

In a certain sense, then, *Dexter* represents the very embodiment of the death penalty--a one man capital punishment machine, if you will, and one that reflects and enacts the media's core message about violent crime. Despite the violence that *Dexter* himself dispenses, he is depicted as a force for good, a champion with whom the audience is encouraged to (and does) readily identify--he is clearly on their side--and they naturally find themselves rooting for him to prevail. Accordingly, television critics have even suggested that *Dexter* is "fundamentally an altruist at heart," someone whose "demonic potential" has been so effectively molded toward the "public good" (by killing the perpetrators of violent crimes) that the series risks "moral absolutism." n228 The show has gone as far as suggesting that its protagonist's vigilante motives are so righteous that they might be the product of divine intervention. Thus, in the trailer for the show's third season, *Dexter* speculated that his remarkable good fortune in narrowly avoiding detection for so long must be the work of "some higher power" that apparently "wants me to keep doing what I'm doing." n229



Indeed, Dexter's violence and his distorted sense of right and wrong are not only justified—he's killing only presumably "deserving" victims after all—but his murderous aggression is also contextualized in terms of past trauma that he suffered—specifically, his having witnessed his mother brutally murdered when he was a child. Of course, the behavior of Dexter's apparently despicable and supposedly deserving victims is not handled by the scriptwriters in remotely the same way; their criminality either goes unexplained or is depicted as the product of pure evil. This is just one of the myriad ways that the show's protagonist is, in the words of one enthusiastic reviewer, "continually differentiating himself, in ways both philosophical and mundane, from the street-grade sociopaths pulp fiction and local news have accustomed us to." n230 It is also a distillation of some of the many ways that media criminology in general accomplishes much the same thing—portraying crime as the exclusive product of decontextualized "street-grade sociopaths" (or much worse) and elevating the status of the most extreme and extremely punitive response possible, no matter how otherwise morally questionable, odious, or counterproductive it is.

## V. Conclusion

Media criminology is so pervasive in American society that its lessons are impossible to avoid. Citizens are bombarded with a largely consistent (and consistently problematic) perspective on criminality, conveyed in powerfully dramatic and increasingly engaging ways. The media's criminological "teachings" consistently misrepresent the nature and magnitude of the crime threat, generating ever-increasing audience shares (and profits) by making the public very afraid, very angry, and very invested in making sure that criminals pay dearly and definitively for their misdeeds. By obsessing over the most extreme and frighteningly bizarre yet statistically rare kinds of crimes, media criminology implicitly legitimates the most punitive possible responses to wrongdoing—including, of course, the death penalty. Citizens thus learn not only that crime must be met exclusively with harsh punishment but also that the more serious the crime and seemingly intractable the criminal, the more severe the punishment that must be administered. n231 The simplicity of the media's core criminological message and the failure to present any broader or more complex alternative views seemingly excludes any other approach.

Beyond contributing in this way to the perceived need for the most severe punishments, media criminology maintains and reinforces a powerful crime master narrative—one that it has helped to create and that now dominates the public's thinking about crime. This narrative and the media messages that repeatedly legitimize and amplify it decontextualize criminal behavior, individualize and internalize its causes, and demonize the persons who engage in it. Broad-based, nuanced, and scientifically valid perspectives on crime that acknowledge and explain its social historical and contextual roots are absent from the media's all-pervasive criminological lesson plans.

Media criminology also widens the empathic divide between citizens and the criminal defendants whose actions they may be called upon to judge. This is particularly problematic in a capital case because the consumers of these biased and inaccurate media messages are empowered to base life and death decisions at least in part on the frameworks of understanding that they have drawn from them. Broadening the perspectives and improving the knowledge base with which capital jurors operate in discharging their daunting responsibilities requires the construction of a more valid and comprehensive counter-narrative, one based on painstakingly in-depth investigations of the lives of capital defendants. The essential logic of the mitigating counter-narrative thus deepens the jurors' insights into the causes of criminal behavior, provides them with a meaningful and valid framework that balances the one-sidedness of the crime master narrative, and enables them to reach a fairer and more informed assessment the defendant's culpability.

Done properly, such counter-narratives must directly rebut many of the things that media-saturated citizens believe they already know about capital defendants. Recognizing the powerful and problematic nature of media criminology underscores the importance of amassing detailed social historical and other psychologically significant facts about the defendant that can compete with and counterbalance the stereotypical misunderstandings that are so widely and effectively disseminated. Pervasive but flawed media lesson plans highlight the necessity of developing a set of cogent and coherent mitigating counter-narrative themes and effectively presenting them to jurors who would otherwise be left to rely on a biased and incomplete framework with which to filter evidence, assess culpability, and render verdicts.

Attorneys who are committed to transcending these mistaken media stereotypes and to broadening the perspective and knowledge base of capital jurors have one important advantage in achieving this task. Despite its power and pervasiveness, the "virtual discipline" of media criminology is bad science; in fact, it is no science at all. Indeed, because its relationship to the truth is merely accidental, media-saturated citizens have been encouraged to obtain their advanced degrees in what might be termed the "ultimate junk science." When the crime master narrative and the media criminology that supports it are effectively challenged—with real science that contextualizes behavior and explains the forces and factors that have helped to shape a defendant's life course—death will no longer serve as the default option for

jurors who have become "expert" on these issues by mastering the false criminological lessons that the media has provided them about who commits serious violent crime and why.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure Sentencing Capital Punishment General Overview Evidence Scientific Evidence Blood & Bodily Fluids Governments Local Governments Elections

#### FOOTNOTES:

n1. The average American viewer spends nearly 130 hours per month watching television. Nielsen Media Research, *Television, Internet, and Mobile Usage in the United States: Nielsen's Three Screen Report 2* (May 2008), available at [http://www.nielsen.com/pdf/3\\_Screen\\_Report\\_May08\\_FINAL.pdf](http://www.nielsen.com/pdf/3_Screen_Report_May08_FINAL.pdf). The estimated 1500-plus hours the average child spends watching television each year in the United States far exceeds the estimated 900 hours per year he or she spends in school. Internet Resources to Accompany the Sourcebook for Teaching Science: Television and Health, [http://www.csun.edu/science/health/docs/tv&health.html#tv\\_stats](http://www.csun.edu/science/health/docs/tv&health.html#tv_stats) (last visited Apr. 22, 2009) [hereinafter Internet Resources].

n2. Among other crime-related content, the more than 20,000 hours to which the average eighteen-year-old has been exposed includes an estimated 200,000 violent acts. See Internet Resources, *supra* note 1.

n3. Nielsen Media Research reported in September 2006 that the average home in the United States had 2.73 television sets and 2.55 people. Average Home Has More TVs Than People, *USA Today*, Sept. 21, 2006, [http://www.usatoday.com/life/television/news/2006-09-21-homes-tv\\_x.htm](http://www.usatoday.com/life/television/news/2006-09-21-homes-tv_x.htm).

n4. Nielsen Media Research reported in 2008 that television sets in the average American household were on eight hours and eighteen minutes per day, up about an hour from the year before, and that the average American watched 142 hours of television per month. News Release, Nielson Co., *Americans Can't Get Enough of Their Screen Time: Nielsen Reports that Internet and Mobile Usage Continues to Increase, As TV Usage Rises to an All-Time High* (Nov. 24, 2008), <http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?vgnnextoid=e6db9c9ba2ecd110VgnVCM100000ac0a260aRCRD>.

According to 2007 data from the same firm, the average citizen watched approximately 4.5 hours of television programming per day. News Release, Nielson Co., *Nielsen Reports Television Tuning Remains at Record Levels: Digital Video Recorders Grow in Popularity* (Oct. 17, 2007), [http://www.tvb.org/pdf/rcentral/Television Tuning Remains at Record Levels.pdf](http://www.tvb.org/pdf/rcentral/Television_Tuning_Remains_at_Record_Levels.pdf).

n5. See Doris A. Graber, *Crime News and the Public* 26 (1980); Jeffrey Cole, *The UCLA Television Violence Report 1997* (1998).

n6. For example, one study of well over a 100,000 stories covered in network evening newscasts during the 1990s found that crime was the single most frequently addressed topic. *The Media at the Millennium: The Networks' Top Topics, Trends, and Joke Targets of the 1990s*, 14 *Media Monitor*, July/Aug. 2000, at 1, 1.

n7. See, e.g., Garrett J. O'Keefe & Kathaleen Reid-Nash, *Crime News and Real-World Blues: The Effects of the Media on Social Reality*, 14 *Comm. Res.* 147, 150 (1987) (citing several studies that found approximately twenty percent of local newspaper coverage was crime-related). Criminal justice researcher Ray Surette has reported that between ten and thirteen percent of national television news and approximately twenty percent of local television news is devoted to crime-related reporting. Ray Surette, *Media, Crime, and Criminal Justice: Images and Realities* 67 (2d ed. 1998).

n8. See, e.g., Craig Haney, *Death By Design: Capital Punishment as a Social Psychological System* 27 (2005); Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 *Hastings Women's L.J.* 27 (1998).

n9. Surveys indicate that the media are the most important source of information about crime for a majority of Americans--sometimes as high as ninety-five percent of the respondents report this. See, e.g., Surette, *supra* note 7, at 197.

n10. As two commentators put it, persons "who lack firsthand experience with the legal system will probably construct their mental images of it from the media's disproportionate coverage of violent and sensational crimes and its focus on law enforcement." Valerie P. Hans & Juliet L. Dee, *Media Coverage of Law*, 35 *Am. Behav. Scientist* 136, 140 (1991).

n11. James O. Finckenauer, *Public Support for the Death Penalty: Retribution as Just Deserts or Retribution as Revenge?*, 5 *Just. Q.* 81 (1988). "Public opinion certainly seems to play a role in the setting of criminal justice policy, including (and perhaps especially) policy regarding capital punishment." *Id.* at 83. Historian Thomas Laqueur referred to capital punishment as "the gold standard of community expression." Thomas W. Laqueur, *Crowds, Carnival and the State in English Executions, 1604-1868*, in *The First Modern Society: Essays in English History in Honour of Lawrence Stone* 305, 355 (A.L. Beier et al. eds., 1989).

n12. As Justice Brennan observed in *Furman v. Georgia*, "There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death." 408 U.S. 238, 286 (1972) (Brennan, J., concurring). One political commentator summed up the centrality of the death penalty to the electoral campaigns taking place in 1990 this way: "From Texas to Florida to California, governors' races show how shamelessly politicians adopted the message of the '88 Bush campaign: Fear of crime is the hottest button a politician can push... The electric chair has replaced the American flag as your all-purpose campaign symbol." Sandy Grady, *Bush's Willie Horton Legacy Lives*, *San Jose Mercury News*, Mar. 18, 1990, at 1A. Indeed, Republican presidential candidate Bob Dole actually began his 1996 California primary campaign with a much-publicized visit to death row. Carla Marinucci & Steven A. Capps, *Dole Talks Tough in Visit to Death Row*, *S.F. Examiner*, Mar. 24, 1996, at A1. "Dole told about 100 prison employees, law enforcement officials, and crime victims he would work to end lenient sentences and wanted to speed up the executions of convicted criminals on death row" by supporting habeas corpus reform. *Id.* Not to be outdone on the crucial punishment question, his opponent was quick to respond: "[President] Clinton has said he favors such reforms and the White House reiterated the support Saturday." *Id.*

n13. In *Ring v. Arizona*, the United States Supreme Court underscored the unique role of the jury in capital cases, ruling that "capital defendants ... are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. 584, 589 (2002).

n14. See, e.g., John Carman, *TV Learns That True Crime Pays*, *S.F. Chron.*, Jan. 26, 1993, at A1; Joshua Hammer, *Television's Cop Connection--Sonny Grosso's Formula: Low Cost and Lowbrow*, *Newsweek*, Aug. 3, 1992, at 62.

n15. Ben H. Bagdikian, *The U.S. Media: Supermarket or Assembly Line?*, in *Do the Media Govern? Politicians, Voters, and Reporters in America* 66, 71 (Shanto Iyengar & Richard Reeves eds., 1997).

n16. See Hans & Dee, *supra* note 10.

n17. Richard Sparks has observed that the "massive development of television and its associated industries has historically coincided with a period of chronic, and sporadically acute anxiety about crime and policing." Richard Sparks, *Television and the Drama of Crime: Moral Tales and the Place of Crime in Public Life* 16 (1992). However, once television and its associated industries became "massively developed," they not only continued to focus on and profit from the public's acute anxiety about crime but also helped to create and maintain it.

n18. *Id.* at 27 (citing Eric Barnouw, *Tube of Plenty: The Education of American Television* (1975); Todd Gitlin, *Inside Prime Time* (1985)).

n19. Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. Miami L. Rev. 229, 269 (1987).

n20. *Network News in the Nineties: The Top Topics and Trends of the Decade*, Media Monitor, July/Aug. 1997, at 1, 3, available at [http://www.cmpa.com/files/media\\_monitor/97julaug.pdf](http://www.cmpa.com/files/media_monitor/97julaug.pdf) [hereinafter *Network News in the Nineties*].

n21. *Id.* This figure excluded coverage of perhaps the decade's most famous murder and criminal trial--the O.J. Simpson case. *Id.*

n22. For an excellent analysis of these issues, see Murray Lee, *Inventing Fear of Crime: Criminology and the Politics of Anxiety* (2007).

n23. Surette, *supra* note 7, at 24.

n24. See, e.g., Alessandra Stanley, *Moody Loners Vs. Bad Guys*, N.Y. Times, Sept. 26, 2003, at E1 (finding it notable that among the "more than two dozen crime shows on prime time" in the 2003 season, "fewer than half are satellites of 'CSI' or 'Law and Order'").

n25. Some examples are discussed *infra* at notes 122-129 and accompanying text.

n26. *Most Wanted: Broadcast Television Aug. 13 Through 19*, N.Y. Times, Aug. 27, 2007, at C7.

n27. See *infra* notes 31-34 and accompanying text.

n28. CBS, *About Without a Trace*, [http://www.cbs.com/primetime/without\\_a\\_trace/about](http://www.cbs.com/primetime/without_a_trace/about) (last visited Apr. 22, 2009).

n29. CBS, *About Cold Case*, [http://www.cbs.com/primetime/cold\\_case/about.shtml](http://www.cbs.com/primetime/cold_case/about.shtml) (last visited Apr. 22, 2009).

n30. CBS announced in February 14, 2008 that the eleven series it had renewed for the 2008-09 season included: *Cold Case*, a show that follows the exploits of a female homicide detective who combines "her instinctive understanding of the criminal mind" with "today's new science" to "solve cases that were previously unsolvable," *About Cold Case*, *supra* note 29; *Criminal Minds*, a series about "an elite team of FBI profilers who analyze the country's most twisted criminal minds, anticipating their next moves before they strike again," CBS, *About Criminal Minds*, [http://www.cbs.com/primetime/criminal\\_minds/about](http://www.cbs.com/primetime/criminal_minds/about) (last visited Apr. 22, 2009); *CSI: Crime Scene Investigation*, a television series featuring "a team of forensic investigators ... collecting the

irrefutable evidence and finding the missing pieces that will solve the mystery," CBS, About CSI, <http://www.cbs.com/primetime/csi/about> (last visited Apr. 22, 2009); CSI: Miami, a spin-off series from CSI that follows another team of forensic investigators, this time in Miami, "who use both cutting-edge scientific methods and old-fashioned police work to solve crimes," CBS, About CSI: Miami, <http://www.cbs.com/primetime/csi/miami/about> (last visited Apr. 22, 2009); CSI: New York, another spin-off from the original CSI featuring forensic investigators who "use high-tech science to follow the evidence and solve crimes in the Big Apple," CBS, About CSI: New York, <http://www.cbs.com/primetime/csi/ny/about> (last visited Apr. 22, 2009); NCIS, a series that follows special agents who "travel the globe to investigate all crime with Navy Or Marine Corps ties," CBS, About NCIS, <http://www.cbs.com/primetime/ncis/about> (last visited Apr. 22, 2009); Numb3rs, a series "inspired by actual events, [Numb3rs] depicts how the confluence of police work and mathematics provides unexpected revelations and answers to the most perplexing criminal questions," CBS, About Numb3rs, <http://www.cbs.com/primetime/numb3rs/about> (last visited Apr. 22, 2009); and Without a Trace, a series about a "special task force" that "finds missing persons by applying advance psychological profiling techniques to peel back the layers of the victims' lives and trace their whereabouts," CBS, About Without a Trace, <http://www.cbs.com/primetime/without-a-trace/about> (last visited Apr. 22, 2009).

n31. Most Wanted: Broadcast Television, October 20 Through 26, N.Y. Times, Nov. 3, 2008, at B11. According to the Times, CSI, CSI: New York, and NCIS were in the top ten, along with Criminal Minds, and a CBS newcomer, The Mentalist. *Id.*; see *infra* notes 128-129 and accompanying text. In fact, crime shows have become so pervasive in network television that a media critic advised the networks--whose ratings were slumping in the "all important 19-49 demographic" not to "become a tacky, utilitarian strip mall of crime procedurals" because, although many of the shows "perform really well," the networks were actually at risk of "deluging the market" by becoming "solely identified with one genre." Matthew Gilbert, *Here are Some Remedies for What's Ailing Network Television*, Santa Cruz Sentinel, Dec. 16, 2008, at A11.

n32. Bill Carter & Stuart Elliott, *CBS Lineup to Build on Current Crop of Winners*, N.Y. Times, May 19, 2004, at C7.

n33. John Leonard, *Bodies in Motion*, N.Y. Mag., Dec. 12, 2005, at 91.

n34. The success of CSI: Miami was followed by a third spin-off--CSI: New York--that debuted in May, 2004, and immediately attracted some twenty-two million viewers. Carter & Elliott, *supra* note 32.

n35. TV.com, *Law & Order Summary*, <http://www.tv.com/law-and-order/show/180/summary.html> (last visited Apr. 22, 2009).

n36. *Id.*

n37. Bill Carter, *Spinoff No. 2: Story is Still King, Ka-Ching*, N.Y. Times, Sept. 30-Oct. 6, 2001, § 13, at 4.

n38. The Law & Order spin-offs supposedly develop slightly different aspects of the law enforcement and prosecution process but are hard to distinguish from one another. Thus, for example, although Criminal Intent is described as presenting "crime stories from the criminals' perspective," it follows much the same format as the original: "bad guys and gals do bad stuff and detectives pursue them ... ." Neil Genzlinger, *New Television Season in Review: Law and Order: Criminal Intent*, N.Y. Times, Sept. 28, 2001, at E28. In addition to these two direct Law & Order spin-offs, another show debuted in the same season, with a similar format. See Anita Gates, *New Television Season in Review: UC Undercover*, N.Y. Times, Sept. 28, 2001, at E28. UC Undercover was about "a special-operations unit in the Justice Department that consists exclusively of attractive, tough-talking young people" whose job "is to infiltrate the inner circles of criminals they are out to catch." *Id.* Indeed, it is difficult to chronicle all of the Law & Order-type shows that have appeared since 2001. For example, in 2005, there was Law & Order: Trial by Jury, described by TV.com as "the latest series from Dick Wolf, architect of

the most successful brand in primetime television." TV.com, *Law & Order: Trial by Jury: Summary*, <http://www.tv.com/law-and-order-trial-by-jury/show/25938/summary.html> (last visited Apr. 22, 2009). In 2006, *Conviction* debuted as a partial *Law & Order* spinoff (using many of the same sets as *Trial by Jury* and a character from *Special Victims Unit*). TV.com, *Conviction: Summary*, <http://www.tv.com/conviction/show/30090/summary> (last visited Apr. 22, 2009); *Crime Pays for "Law & Order's" Dick Wolf*, MSNBC.com, Oct. 20, 2005, <http://www.msnbc.msn.com/id/9766633> [hereinafter *Crime Pays*]. Like *Trial by Jury* however, *Conviction* was short-lived, in part because it could not compete against a new "math police procedural" called *Numb3rs*.

n39. *Crime Pays*, *supra* note 38.

n40. *Id.*

n41. *Id.*

n42. *Genzlinger*, *supra* note 38.

n43. Frazier Moore, *Crime Pays Big for Dick Wolfe, Creator of "Law and Order,"* Santa Cruz Sentinel, Oct. 21, 2005, at B6.

n44. Mike Hale, *Cops and Prosecutors on a 19-Year Beat*, N.Y. Times, Nov. 5, 2008, at C1.

n45. *Id.*

n46. Nielsen Media Research, *supra* note 1, at 4.

n47. Nancy Franklin, *Women's Work: Sunday Night on Lifetime*, New Yorker, Aug. 13, 2007, at 86, 86.

n48. Showtime, *Dexter Character Guide: Dexter Morgan*, <http://www.sho.com/site/dexter/characters.do> (last visited Apr. 22, 2009).

n49. *Id.*

n50. Showtime, *Dexter: Season 2 Trailer*, <http://www.sho.com/site/video/brightcove/series/title.do?bcpid=1305238289&bclid=1340048659> (last visited Apr. 22, 2009).

n51. See Academy of Television Arts & Sciences, *Primetime Awards*, <http://www.emmys.tv/awards/2007pt/nominations.php> (last visited Apr. 22, 2009).

n52. Press Release, Academy of Television Arts & Sciences, *59th Annual Primetime Emmy Awards*, at 5, 10 (Sept. 16, 2007), available at [http://cdn.emmys.tv/downloads/2007/pte59emmy winners.pdf](http://cdn.emmys.tv/downloads/2007/pte59emmy%20winners.pdf).

n53. *Id.*

n54. See Gray Cavender & Lisa Bond-Maupin, *Fear and Loathing on Reality Television: An Analysis of "America's Most Wanted" and "Unsolved Mysteries,"* 63 Soc. Inquiry 305 (1993); Michael Hallett, *Guns and*

Roses on "Cops," 7 *Peace Rev.* 233 (1995); Jon Katz, *Covering the Cops: A TV Show Moves in Where Journalists Fear to Tread*, *Colum. Journalism Rev.*, Jan./Feb. 1993, at 25.

n55. Tim Goodman, *Going, Going, Gone--& Not a Bit Too Soon*, *Santa Cruz Sentinel*, May 1, 1999, at D5.

n56. Ned Martel, *Perp Nation: "Cops" and Its Steady Run of Bad Boys*, *N.Y. Times*, Nov. 10, 2007, at B7.

n57. *Id.*

n58. *Id.*

n59. *Id.*

n60. Deborah Potter, Foreword, in Jeremy H. Lipschultz & Michael L. Hilt, *Crime and Local Television News: Dramatic, Breaking, and Live From the Scene* xi, xi (2002).

n61. Lipschultz & Hilt, *supra* note 60, at 59-60.

n62. *Id.* at 60.

n63. Ray Eldon Hiebert & Sheila Jean Gibbons, *Exploring Mass Media for a Changing World* 247-48 (2000).

n64. *Network News in the Nineties*, *supra* note 20, at 1.

n65. Hiebert & Gibbons, *supra* note 63, at 247.

n66. Mindy Sink, *Media Bring World to Suburb's Doorstep*, *S.F. Examiner*, Apr. 25, 1999, at A18.

n67. *Id.*

n68. *Id.*

n69. Frank Rich, *The Fast Friends of John F. Kennedy Jr.*, *N.Y. Times*, July 31, 1999, at A11.

n70. *Id.*

n71. *Id.*

n72. *Network News in the Nineties*, *supra* note 20, at 2-3.

n73. George Lipsitz, *The Greatest Story Ever Sold: Marketing and the O.J. Simpson Trial*, in *Birth of a Nationhood: Gaze, Script, and Spectacle in the O.J. Simpson Case* 3, 10 (Toni Morrison & Claudia Brodsky Lacour eds., 1997).

n74. See, e.g., Craig Wolff, *Look Who's Talking*, N.Y. Times, Mar. 23, 1997, Book Review, at 30 (reviewing Mark Fuhrman, *Murder in Brentwood* (1997) and describing Fuhrman's as "roughly the 60th book on the case to be published so far").

n75. George Lipsitz recounted the media marketing in detail:

A major Los Angeles radio station gave defense witness Brian "Kato" Kaelin his own talk show because of the trial. One outside "expert" frequently employed by television networks during the trial, attorney Gerry Spence, parlayed his guest commentaries on the Simpson case on a variety of program into his own televised talk show on CNBC. The William Morris Agency won a hotly contested battle to serve as theatrical and public relations representative for lead prosecutor Marcia Clark. Edward Billet Productions purportedly offered Judge Lance Ito \$ 1 million to star in a new version of the television program *The People's Court*. Industry experts confided to Advertising Age reporters that "Simpson-related marketing could produce as much as \$ 1 billion in media and merchandising sales. During the trial, Simpson had his lawyers take out patent protection for his full name as well as for his nicknames "O.J." and "The Juice," and had them file more than fifty lawsuits against merchandisers marketing items bearing his name. In addition, Simpson negotiated deals for a video, a book, pay-per-view interviews, and other projects that might eventually net as much as \$ 18 million,

Lipsitz, *supra* note 73, at 10.

n76. Joyce Wadler, *No Not You, He Meant the Other Dentist*, N.Y. Times, Jan. 7, 2005, at B2 (quoting Henry Schleiff, Court TV's Chief Executive).

n77. J. Max Robins, *Cable News Goes to Graceland* (Jan. 6, 2009), available at <http://paleycenter.org/cable-news-goes-to-graceland>.

n78. *Id.*

n79. *Id.*

n80. *Id.*

n81. Martin Williams, *Television: The Casual Art* 121 (1982).

n82. Joseph Gixti, *Consuming Cannibals: Psychopathic Killers as Archetypes and Cultural Icons*, 18 J. Am. Culture 87 (1994).

n83. *Id.*

n84. Thomas Harris, *Hannibal* (1999),

n85. Thomas Harris, *Silence of the Lambs* (1988) [hereinafter *Silence of the Lambs*]. The first book in this "Lechter trilogy" was *Red Dragon*. Thomas Harris, *Red Dragon* (1981).



n86. Directed by Jonathan Demme, the film *Silence of the Lambs* starred Anthony Hopkins and Jodie Foster. It received all five major Academy Awards that year: best picture, best director, best screenplay, best actor, and best actress.

n87. Grixti, *supra* note 82, at 93.

n88. Also on the list that month was a novelization of one of the *Star Wars* episodes: Terry Brooks, *Star Wars Episode I: Phantom Menace* (1999).

n89. Lists of Bestselling Books: Fiction, N.Y. Times, May 30, 1999, at 22.

n90. Janet Fitch, *White Oleander* (1999).

n91. Mary Higgins Clark, *We'll Meet Again* (1999).

n92. John Sanford, *Certain Prey* (1999).

n93. Martel, *supra* note 56.

n94. *Id.*

n95. *Id.*

n96. *Id.*

n97. See generally Michael Hallett & Dennis Powell, Backstage with "COPS": The Dramaturgical Reification of Police Subculture in American Crime "Info-Tainment," 14 *Am. J. Police* (1995).

n98. By late 2008, *Variety* reported that "although reality television has become a constant in primetime, the sheer tonnage of unscripted series rolling out in January [of 2009] is jolting." Brian Lowery, *Homeland Security USA*, *Variety*, Dec. 30, 2008, available at <http://www.variety.com/review/VE1117939280.html?categoryid=32&cs=1>.

n99. Sarah Geraghty, Challenging the Banishment of Registered Sex Offenders From the State of Georgia: A Practitioner's Perspective, 42 *Harv. C.R.-C.L. L. Rev.* 513 (2007).

n100. Christopher Winters, Cultivating a Relationship That Works: Cyber-Vigilantism and the Public Versus Private Inquiry of Cyber-Predator Stings, 57 *U. Kan. L. Rev.* 427, 429 (2009) (citing Douglas McCollam, *The Shame Game*, *Colum. Journalism Rev.*, Jan./Feb. 2007, at 28, 30-32).

n101. *Id.* Another commentator, discussing the way that "pop culture" had "spurred more widespread concern about sex offenders," described the program and its impact this way:

Dateline NBC's popular primetime television show *To Catch a Predator* features hidden camera investigations of "potential child predators," lured to various locations by investigators posing as children in Internet chat rooms. According to NBC, the stings have exposed over two hundred "potential child predators." *To Catch a*

Predator's host, Chris Hansen, has become a folk hero of sorts and has even authored a successful book, *To Catch a Predator: Protecting Your Kids from Enemies Already in Your Home*.

Monica Bell, *Grassroots Death Sentences? The Social Movement For Capital Child Rape Laws*, 98 J. Crim. L. & Criminology 1, 18 (2007) (footnotes omitted).

n102. *Conradt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 383 (S.D.N.Y. 2008). In this case, the man in question, William Conradt, had refused to go to the "sting house" where the show's host, Chris Hansen, was waiting to ensnare him. *Id.* Thwarted in enacting the show's usual humiliating format, "Hansen asked the police for a 'favor,' saying, 'If he won't come to us, we'll go to him.' He insisted that the police obtain search and arrest warrants for Conradt." *Id.* at 386 (citations omitted).

n103. *Id.*

n104. *Id.*

n105. *Id.* The judge quoted further from the complaint filed in the case, noting that:

To increase ratings, Dateline seeks "to sensationalize and enhance the entertainment value" of the confrontations, and accordingly it encourages the police officers "to give a special intensity to any arrests, so as to enhance the camera effect." Indeed, the "mainstay of the show is public humiliation" of the individuals who are lured to the sting houses by the promise of sex with a minor.

*Id.* at 385 (citations omitted). He also underscored the degree to which the media and law enforcement functions were co-mingled in the course of creating each episode of the show:

In producing "To Catch A Predator," Dateline provides equipment, money, services, and other things of value to local police departments. In return, local law enforcement agrees to participate in the show, permits Dateline to videotape arrests in "dramatically-staged scenarios," provides Dateline with confidential data, and permits [the show's host] Hansen to interview suspects even before detectives interview them.

*Id.* (citations omitted).

n106. Fox Reality: Smile ... You're Under Arrest! Season One, <http://www.foxreality.com/news.php?id=86567> (last visited Apr. 22, 2009).

n107. David Carr, *A Star Turn For a Sheriff On Fox TV*, N.Y. Times, Jan. 5, 2009, at B1.

n108. *Id.*

n109. *Id.*

n110. *Id.*

n111. Homeland Security USA: About, <http://abc.go.com/primetime/homelandsecurity/index?pn=about> (last visited Apr. 22 2009) (providing a description of the series).

n112. Alessandra Stanley, Protecting the Borders and Other (Not Necessarily) Hot Pursuits, N.Y. Times, Jan. 6, 2009, at C1.

n113. Id. Another reviewer developed the same theme, albeit a bit more pointedly: "Rolling the wars on terror, drugs, and illegal immigration into one rhetorical package, Homeland Security USA plays partly like a pumped-up recruiting film, partly like a public-affairs outreach video for hard-core video gamers." Troy Patterson, Homeland Security USA: A Show About the Brave Agents Defending America From Swiss Belly Dancers, Slate.com, Jan. 5, 2009, available at <http://www.slate.com/id/2207905>.

n114. Brian Stetler, On the Trail of War Criminals, NBC News Stirs Up Criticism, N.Y. Times, Feb. 11, 2009, at A16.

n115. Id.

n116. Id.

n117. Id.

n118. TV.com, *supra* note 35.

n119. TV Guide News: Law & Order, <http://www.tvguide.com/tvshows/law-order/100255> (last visited Apr. 22 2009).

n120. DVD Movie Guide, <http://dvdmg.com/profilerseason.1.shtml> (last visited Apr. 22, 2009).

n121. Id.

n122. Tim Goodman, It Doesn't Take a Sixth Sense to Figure Out Weakness of "Medium," S.F. Chron., Jan. 3, 2005, at C1.

n123. Id.

n124. CBS.com: About the Mentalist, [http://www.cbs.com/primetime/the mentalist/about/](http://www.cbs.com/primetime/the%20mentalist/about/) (last visited Apr. 22, 2009).

n125. Id.

n126. Id.

n127. Id.

n128. Benjamin Toff, CBS's "Mentalist" Leaps Past "Dancing," N.Y. Times, Sept. 25, 2008, at B2; see also Lisa Bernhard, "Mentalist" Is a Hit, But Who Can See Into Its Future?, N.Y. Times, Nov. 30, 2008, at 24 ("The Mentalist" made its debut in late September to an impressive 15.5 million viewers--thanks in part to its hit lead-in, 'NCIS' ...").

n129. The remarkable success of The Mentalist notwithstanding, its "psychic with a twist" premise was not an original one. See Toff, *supra* note 128. Another cable crime drama series, Psych, had debuted in July 2006, featuring a young crime consultant for the Santa Barbara, California Police Department whose "heightened observational skills" had convinced people that he was a psychic. The Futon Critic: Psych Debuts as This Year's Most Watched New Show in Basic Cable, <http://www.thefutoncritic.com/news.aspx?id=20060711usa01> (last visited Apr. 22, 2009). When the show debuted, it was the most watched show on cable television. *Id.*

n130. See 2007 Numbers: MSNBC, Inside Cable News, <http://insidecable.blogsome.com/2007/12/19/2007-numbers-msnbc> (last visited Apr. 22, 2009).

n131. See, e.g., Jeff Bercovici, Pulled by Ratings, MSNBC Tacks Left, NPR, available at <http://www.npr.org/templates/story/story.php?storyId=16066872> (last visited Apr. 22, 2009).

n132. See 2007 Numbers, *supra* note 130 ("MSNBC is also experiencing substantial growth in 10 PM-midnight (ET), the 'Doc Block.' MSNBC's documentary is up 32% in total viewers.").

n133. For example, according to MSNBC's website in May 2008, the lineup for the week of May 11, 2008 had several additional entries from the Lockup series, including: on Monday, Inside Kern Valley ("California's newest prison"); on Tuesday, Return to Pelican Bay, where "just about every inmate ... is a gang member") and also New Mexico (filmed inside the remnants of a penitentiary that was "the site of one of the bloodiest prison riots in 1980" and where viewers were promised they could still see "disturbing physical reminders of the carnage"); Inside San Quentin (where the filmmakers had gotten "unprecedented access" to the prison, "including a rare look inside California's death row"); on Thursday, Holman (about a prison in Alabama that was described as "notorious for being overcrowded and violent"); on Friday, Rikers Island (where viewers were promised a look at a unit housing "some of the toughest and most unruly criminals"), Inside Folsom (about a prison with "a violent and bloody reputation" that is "known as 'the end of the world' by inmates"), and Pendelton Juvenile (a facility where "violent teenagers pose a serious threat to officers"). On Saturday, the week ended with Return to Valley State (a women's prison described as "full of murderers, violent criminals and drug dealers"), and Wabash (a prison that "houses some of the most violent offenders and also the mentally ill"). Other shows--not shown that particular week but advertised on the station's website--included Conviction: Monster in the Mirror, Conviction: I Put Fear in Your Life, Conviction: The Orchard Massacre, In Cold Blood, Deadly Exchange, and Lockup Raw: Criminal Minds.

Yet that was not the full extent of the network's crime-and-punishment-related programming. In addition to the sensational prison documentaries and day-long lineup of heinous crimes shown during the "Mother's Day Marathon" that began the week, the network interspersed its programming on subsequent days with even more shows depicting frightening, salacious crimes: on Tuesday, Into the Woods (about a "soft-spoken teenager heading home from school" who "meets a stranger with plans of his own"); on Wednesday, The Mind of Manson (in which FBI "profilers" discuss "never before seen parts" of a more than twenty-year-old interview with Charles Manson, who is described as "unshackled and unapologetic"); on Thursday, Gladiator Days (about "the culture of institutional violence" as represented by "one brutal prison murder"), and Cult Killer (about a Christian sect whose ideas "got out of hand when it began to turn towards prostitution and pedophilia").

n134. For example, on New Year's Day, 2004, its "New Year's Marathon" featured day-long series of films whose producers boasted of "gaining extraordinary access" to many a number of maximum security prisons, including a film on San Quentin (this time described as a "crumbling" facility plagued by "an overwhelming increase in the number and severity of brutal assaults by inmates"), followed by a film on the Stateville Correctional Center located outside of Chicago (said to be "home to some of the state's most violent criminals"),

another one that took viewers inside Folsom Prison (described again as having "the reputation of being a violent and bloody place" that prisoners called "the end of the world"), and concluding with a two-hour film on the Los Angeles County Jail (where viewers were told they'd be taken "behind the walls of this overcrowded and violent jail system, including the dangerous Super Max facility"). The "Lock-up" Series: New Years Marathon, <http://www.msnbc.msn.com/id/3080749> (last visited Apr. 22, 2009). The "holiday marathons" have continued. Thus, just in time for the most festive season of the year, MSNBC more recently promoted what it called its "Three Days of Christmas Marathon" in December 2008, featuring *Conviction*, *Crime & Punishment*, and *Lockup*, on Christmas Eve, Christmas Day, and the day after Christmas respectively, and advertised the extravaganza on the network all Christmas week, beginning December 22, 2008. The show *Crime & Punishment* is one that MSNBC acquired the rights to in November 2006. See MSNBC Acquires Rights To 'Super Size Me,' 'Crime & Punishment,' Indie Docs to Mediabistro, <http://www.mediabistro.com/tvnewser/msnbc/msnbc> acquires rights to super size me crime punishment indie docs 48156.asp (Nov. 27, 2008 11:12 AM). Dubbed "the real life 'Law and Order,'" the "*Crime & Punishment*" series used a documentary format to focus on the work of a group of actual San Diego County prosecutors. The MSNBC trailer promoting the show described it as depicting "real prosecutors, real victims, real justice" and enticed potential viewers by telling them: "from Dick Wolf, the creator of 'Law and Order' comes a series is so raw, so powerful, it could only be real." Veoh.com, MSNBC Crime & Punishment Promo, <http://www.veoh.com/collection/s601811/watch/e167560X6hRsync> (last visited Apr. 22, 2009).

Appropriately, it would seem, MSNBC followed up its 2008 "Three Days of Christmas Marathon" with a "New Year's Eve Marathon," the trailers for which were broadcast throughout the week between Christmas and New Year's Eve--including during the station's day-long and widely watched news and politics programming. The network enticed potential viewers by showing footage of fearsome looking convicts, as a voiceover repeated what were characterized as the "three rules of prison survival," including "kill or be killed," "trust no one," and "pray for tomorrow." The trailer ended with a prisoner's menacing observation that "human beings are the most dangerous animals on earth."

n135. MSNBC to Debut New Lockup Series ... , <http://insidecable.blogsome.com/2008/02/06/msnbc-to-debut-new-lockup-series> (last visited Apr. 22, 2008).

n136. *Id.*

n137. *Id.*

n138. Frank Ahrens, Discover Hope for Payoff on Crime Channel, *Wash. Post*, Nov. 27, 2007, at D1.

n139. *Id.*

n140. *Id.*

n141. *Id.*

n142. *Id.* (quoting Discover Chief Executive David M. Zaslav).

n143. *Id.*; Investigation Discovery Home Page, <http://investigation.discovery.com> (last visited Apr. 22, 2009).

n144. *Id.* These videos include one on *Deadly Women: Female Psychopaths* and another, *Deranged*, that promises to "take you inside the original investigations of the most notorious killers in recent history" as well as allowing you to "watch deleted scenes and more." *Id.*

n145. Dr. Stone's "Most Evil Scale," <http://investigation.discovery.com/tv/most-evil/evil-scale/evil-scale.html> (last visited Apr. 22, 2009) [hereinafter Dr. Stone's "Most Evil Scale"]. The scale is supposedly the product of "Dr. Michael Stone," described in the press as a professor of psychiatry at Columbia University, who "examined the biographies of more than 500 killers in New York's Mid-Hudson Psychiatric Centre and developed a 22-level 'gradations of evil' list." Charles Laurence, Psychiatrists Devise "Depravity Rating" to Help Courts Decide on Death Sentences, *Telegraph*, Feb. 20, 2005, available at <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1483959/Psychiatrists-devise-depravity-rating-to-help-courts-decide-on-death-sentences.html>. According to Stone: "After years of study, we have learned to recognize the traits of these people: what they do and why they do it," he said. "It is time to give them the proper appellation—evil." *Id.* In fact, Dr. Stone hosted his own Investigation Discovery television show, "Most Evil," that aired between 2006 and 2008, and followed Stone "as he attempted to better understand the minds of the world's most infamous criminals." TV.com: Most Evil Show Overview, <http://www.tv.com/most-evil/show/75579/summary.html> (last visited Apr. 22, 2009). The show was put "on hiatus" in April, 2008, but the "Most Evil Scale" survives. The Investigation Discovery website describes the scale as one in which Stone "examines the criminal mind with a scale he created that decodes a killer's motive, method and mind." Dr. Stone's "Most Evil Scale," *supra*. Visitors to the website are provided with a numbered "scale of evil" that rank orders types of murder and specific murderers along a continuum that supposedly represents their degrees of "evil." *Id.* It starts with murder committed in self defense (at point 1 on the scale) and ending, some 21 points later, with "psychopaths who inflict extreme torture on their victims and then murder them." *Id.* Each point on "Dr. Stone's Most Evil Scale" contains a photograph of the criminal said to typify that level of evil, and a short description of the crime for which he or she was convicted. For example, Level 22 of evil was supposedly typified by Dennis Rader, the so-called "BTK Killer" arrested in Kansas for the rape and murder of his victims. *Id.* The website invited visitors who thought they knew "everything" about the BTK Killer to "take our Dennis Rader quiz" and find out. *Id.*

n146. truTV: About Us, <http://www.trutv.com/about/index.html> (last visited Apr. 22, 2009).

n147. truTV Crime Library: About, <http://www.trutv.com/library/crime/about/index.html> (last visited Apr. 22, 2009).

n148. See *Psych Debuts as This Year's Most Watched New Show in Basic Cable* (July 11, 2006 12:00 AM), <http://www.thefutoncritic.com/news.aspx?id=20060711usa01>. Although its ratings dwindled somewhat, *Psych* was renewed for a third season that began airing in January 2009. *Id.*

n149. *Psych TV Series: Mobile Alerts*, <http://www.usanetwork.com/series/psych/community/mobile> (last visited Apr. 22, 2009).

n150. *Id.*

n151. Jayne Clark, Learn the Tricks of the "CSI" Trade, *USA Today*, Oct. 17, 2008, at 1D.

n152. *Id.*

n153. *Id.*

n154. *Dexter: Special Features*, <http://www.sho.com/site/dexter/special/features.do> (last visited Apr. 22, 2009).

n155. Id.

n156. Id.

n157. Dexter: Alerts, <http://www.sho.com/site/dexter/alerts.do> (last visited Apr. 22, 2009).

n158. See Showtime Dyes for Dexter, Bus. Wire, Sept. 27, 2007, available at [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_2007\\_Sept\\_27/ai\\_n27389876](http://findarticles.com/p/articles/mi_m0EIN/is_2007_Sept_27/ai_n27389876).

n159. Id.

n160. Id. For photos of the installations in cities around the country, see Showtime, Dexter Video, <http://www.sho.com/site/video/brightcove/series/title.do?bcpid=1305238289&bclid=1309638548&bctid=1311211025> (last visited Apr. 22, 2009).

n161. See Stuart Elliott, A Serial Killer On Television, Now a Serial "Cover Boy," N.Y. Times, Sept. 5, 2008, at C5.

n162. Id. The "advertisement" label is a requirement of the American Society of Magazine Editors, done to distinguish actual editorial content from advertising. Id. The Dexter ads were elaborately produced and extremely realistic. For example, the US Weekly ad was a full seven-page glossy spread beginning on the magazine's back cover, including such macabre double entendres as "Dexter Morgan spills his guts," a list of "Dead Giveaways" that "You're Dating a Serial Killer," descriptions of the show's female actresses as "Drop Dead Gorgeous," and a question to readers asking if they were "Dying for More?" US Weekly, Sept. 29, 2008, at 108-14.

n163. Elliott, *supra* note 161.

n164. Id.

n165. For example, in Dexter's fictitious interview in US Weekly, he answered the question, "Dexter--you kill people. What's the deal?" by saying, "I don't kill good people and I don't kill children. It's not personal, really. If you're scum, I'm coming for you. And I'm good at what I do." US Weekly, *supra* note 162, at 114. Similarly, in the mock "profile" done of him that appeared in The New Yorker, Dexter is described as "America's favorite serial killer," largely because he has "something most of his fellow serials lack: standards. You see, he's a serial killer who kills other serial killers." New Yorker, Sept. 19, 2008, at 44. The advertisement includes this tidbit of pop criminology: "Experts on the minds of psychopaths explain that it's difficult to treat or even identify these individuals, because you are not dealing with a complete man. Instead, the individual is a carefully constructed machine that mimics a healthy human personality." Id.

n166. Fox Butterfield, A Newcomer Breaks Into the Liberal Arts: Criminal Justice, N.Y. Times, Dec. 5, 1998, at B9.

n167. Id.

n168. Id.

n169. Hallett & Powell, *supra* note 97, at 124.

n170. Id.

n171. Tad Friend, *Postmortem: TV Crimebusters*, *New Yorker*, June 3, 2002, at 38.

n172. Id.

n173. Criticism of the media's role in promoting and distorting crime-related issues dates to at least the nineteenth century. As Joseph Holmes observed in 1929, "since the rise of criminology in the middle of the past century there is no writer of note on the subject who has failed to comment on the evil influence of the [media]." Joseph L. Holmes, *Crime and the Press*, 20 *J. Am. Inst. Crim. L. & Criminology* 6, 6 (1929). For a discussion of the way that media portrayals may have biased jurors at the turn of the last century, as well as references to very early criticism of the role of the press in reinforcing social prejudices that compromised the administration of justice. See Shannon Peterson, *Yellow Justice: Media Portrayal of Criminal Trials in the Progressive Era*, 1 *Stan. J. Legal Stud.* 72 (1999).

n174. Michael Morgan & Nancy Signorelli, *Cultivation Analysis: Conceptualization and Methodology*, in *Cultivation Analysis* 9, 9-10 (Nancy Signorelli & Michael Morgan eds., 1990); see also George Gerbner & Larry Gross, *The Scary World of TV's Heavy Viewer*, *Psychol. Today*, Apr. 1976, at 89; Craig Haney & John Manzolati, *Television Criminology: Network Illusions of Criminal Justice Realities*, cited in Elliot Aronson, *Readings About the Social Animal*, in *Media Lesson Plans: Criminological Mis-Education and the Death Penalty* (1980).

n175. Thomas Mathiesen, *Television, Public Space and Prison Population: A Commentary on Mauer and Simon*, 3 *Punishment & Soc'y* 35, 38 (2001).

n176. Id. On *CSI*, for example, "in most episodes, someone declares the evidence to be the absolute truth." Gray Cavender & Sarah Deutsch, *CSI and Moral Authority: The Police and Science*, 3 *Crime, Media, Culture* 67, 75 (2007).

n177. See, e.g., Melanie C. Green, Jeffrey J. Strange & Timothy C. Brock, *Narrative Impact: Social and Cognitive Foundations* (2002); A. Singhal & E. Rogers, *Entertainment-Education: A Communication Strategy for Social Change* (1999); Michael Slater & Donna Rouner, *Entertainment Education and Elaboration Likelihood: Understanding the Processing of Narrative Persuasion*, 12 *Comm. Theory* 173 (2002).

n178. See Barry Glassner, *The Culture of Fear: Why Americans Are Afraid of the Wrong Things* (1999). On the "fear of crime" phenomenon more specifically, see Lee, *supra* note 22.

n179. Mike Davis, *Ecology of Fear: Los Angeles and the Imagination of Disaster* (1998).

n180. See, e.g., Danielle Soulliere, *Prime-Time Crime: Presentations of Crime and Its Participants on Popular Television Justice Programs*, 26 *J. Crime & Just.* 47 (2003). See also Kenneth Dowler, *Comparing American and Canadian Local Television Crime Stories: A Content Analysis*, 46 *Canadian J. Criminology & Crim. Just.* 573, 587 (2004), who found that, although there were very few significant differences in the types of crimes covered in local newscasts in American versus Canadian media, the American broadcast coverage tended to be more "sensationalistic" in nature. Dowler suggested that this likely stemmed from the greater range of crime news from which American news producers could pick that, in turn, allowed them to select the more sensationally slanted stories, and also from the tendency for the American media to "adopt ... strategies that encourage sensationalistic coverage of relatively routine stories" in an apparent "attempt to attract viewers." Id.



n181. See, e.g., Lee, *supra* note 22, at 165 (noting that "media organizations have increasingly discovered that the public fear of crime can sell newspapers, attract listeners, and attract viewers if it is invoked with just the right editorial zeal and is aimed at mobilizing deep-seated anxieties in the public"). For an early demonstration and discussion of the anxiety-arousing aspect of media crime programming, see Jennings Bryant, Rodney Carveth & Dan Brown, *Television Viewing and Anxiety: An Experimental Examination*, 31 J. Comm. 106 (1981).

n182. David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001).

n183. For example, studies have demonstrated a direct relationship between the amount of newspaper space devoted to violent crime and the likelihood that neighborhood residents selected crime as their community's most serious problem. See Margaret Gordon & Linda Heath, *The News Business, Crime, and Fear*, in *Agenda Setting: Readings on Media, Public Opinion, and Policymaking* 71 (David Protess & Maxwell McCombs eds., 1991). In fact, some researchers have found that actual direct experience with crime may reduce one's fear of it. See, e.g., Robert J. Gebotys, Jillian V. Roberts & Bikram DasGupta, *News Media Use and Public Perceptions of Crime Seriousness*, 30 Canadian J. Criminology 3 (1988). See generally Melissa Hickman Barlow, David E. Barlow, & Theodore Chiricos, *Mobilizing Support for Social Control in a Declining Economy: Exploring Ideologies of Crime Within Crime News*, 41 *Crime & Delinquency* 191 (1995); Jason Ditton & James Duffy, *Bias in the Newspaper Reporting of Crime News*, 23 *Brit. J. Criminology* 159 (1983); Mark Fishman, *Crime Waves as Ideology*, 25 *Social Problems* 531 (1978); Steven M. Gorelick, *"Join Our War": The Construction of Ideology in a Newspaper Crimefighting Campaign*, 35 *Crime & Delinquency* 421 (1989); Edie Greene, *Media Effects on Jurors*, 14 *Law & Hum. Behav.* 439 (1990); R. Mawby & J. Brown, *Newspaper Images of the Victim: A British Study*, 9 *Victimology* 82 (1984).

n184. Daniel Romer, Kathleen Hall Jamieson & Sean Aday, *Television News and the Cultivation of Fear of Crime*, 53 J. Comm. 88, 94, 98 (2003). Romer et al. found "strong support for the television-exposure hypothesis," that is, that viewers of local television news should experience "heightened perceptions of crime risk on both a personal and societal level." *Id.* at 99. Moreover, exposure to local news appears to have especially strong fear-generating effects when it "resonates" with the experience or "crime reality" of its consumers (for example, when they live in high crime areas or have recently been the victims of crime). See Ted Chiricos, Kathy Padgett & Marc Gertz, *Fear, TV News, and the Reality of Crime*, 38 *Criminology* 755 (2000). See generally Jeffrey J. Strange & Cynthia C. Leung, *How Anecdotal Accounts in News and Fiction Can Influence Judgments of a Social Problem's Urgency, Causes, and Cures*, 25 *Personality & Soc. Psychol. Bull.* 436 (1999).

n185. For example, one study found that nearly eighty percent of the crimes depicted in *NYPD Blue* in its 2000 season were homicides, as were over ninety percent of the crimes on *Law & Order* that same year. Sarah Eschholz, Matthew Mallard & Stacey Flynn, *Images of Prime Time Justice: A Content Analysis of "NYPD Blue" and "Law & Order,"* 10 J. Crim. Just. & Popular Culture 161, 171 tbl.5 (2004).

n186. A number of studies have documented the tendency of media exposure to make persons more punitive in the sentencing options they choose. See, e.g., Julian Roberts & Anthony Doob, *News Media Influences on Public Views of Sentencing*, 14 *Law & Hum. Behav.* 451 (1990); Julian V. Roberts & Don Edwards, *Contextual Effects in Judgments of Crimes, Criminals, and the Purposes of Sentencing*, 19 J. Applied Soc. Psychol. 902 (1989). As one literature review concluded, "Preferences for highly punitive sanctions in the criminal justice system are one consequence of the media's predilection for covering violent and sensational crimes." Hans & Dee, *supra* note 10, at 142. For a discussion of the role of anger in generating widespread public support for harsh policies of crime control, see Devon Johnson, *Anger About Crime and Support for Punitive Criminal Justice Policies*, 11 *Punishment & Soc'y* 51 (2008).

n187. Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 Hofstra L. Rev. 835, 842 (2008). To be sure, media criminology alone did not create the crime master narrative. Elsewhere, I have argued that the cultural and legal traditions that helped produce it date back to the nineteenth century. See Craig Haney, *Psychological Theory and Criminal Justice Policy: Law and Psychology in the "Formative Era,"* 6 Law & Hum. Behav. 191, 205 (1982). But media criminology does consistently frame its crime-related discourse in ways that repeatedly re-establish and reinforce the crime master narrative. Lloyd Humphries put the matter in a different but related way: "Stories on serious crime are, however, ideological in a 'hegemonic' sense; their presentation conforms to the way of life and thought that predominates in and is diffused throughout our society in all its institutional manifestations." Drew Humphries, *Serious Crime, News Coverage, and Ideology: A Content Analysis of Crime Coverage in a Metropolitan Paper*, 27 Crime & Delinquency 191, 205 (1981).

n188. See also, e.g., Shanto Iyengar, *Is Anyone Responsible? How Television Frames Political Issues* (1991); David Fabianic, *Television Dramas and Homicide Causation*, 25 J. Crim. Just. 195 (1997); Danielle Soulliere, *Prime-Time Murder: Presentations of Murder on Popular Television Justice Programs*, 10 J. Crim. Just. & Popular Culture 12 (2003).

n189. See, e.g., Carol S. Dweck et al., *Implicit Theories and Their Role in Judgments and Reactions: A World From Two Perspectives*, 6 Psychol. Inquiry 267 (1995); Sheri R. Levy, Steven J. Stroessner & Carol S. Dweck, *Stereotype Formation and Endorsement: The Role of Implicit Theories*, 74 J. Personality & Soc. Psychol. 1421 (1998).

n190. See, e.g., Benjamin Gervy et al., *Differential Use of Person Information in Decisions About Guilt Versus Innocence: The Role of Implicit Theories*, 25 Personality & Soc. Psychol. Bull. 17, 18 (1999); Allen McConnell, *Implicit Theories: Consequences for Social Judgments of Individuals*, 37 J. Experimental Soc. Psychol. 215 (2001).

n191. See, e.g., Chi-yue Chiu et al., *Implicit Theories and Conceptions of Morality*, 73 J. Personality & Soc. Psychol. 923 (1997); Cynthia Erdley & Carol Dweck, *Children's Implicit Personality Theories as Predictors of Their Social Judgments*, 64 Child Dev. 863 (1993).

n192. Jeremy A. Blumenthal, *Implicit Theories and Capital Sentencing: An Experimental Study*, 59 Syracuse L. Rev. 1, 12 (2008). See also Robert L. Young, *Race, Conceptions of Crime and Justice, and Support for the Death Penalty*, Soc. Psychol. Q. 67 (1991).

n193. For example, Fabianic concluded that the persistent tendency of television crime drama to absolve social factors and blame perpetrators alone repeatedly reaffirms the view that "individuals have complete control over who and what they are and therefore, are entirely accountable and responsible for their behavior." Fabianic, *supra* note 188, at 201. This, correspondingly, serves as apparent validation for "the principle that focusing on the offender, rather than social conditions or circumstances, is the proper method of confronting the problem of homicide." *Id.*

n194. Lee, *supra* note 22, at 188. Many analysts have reached a similar conclusion. For example, Kenneth Dowler concluded:

Crime portrayals are almost always based exclusively on individual characteristics rather than on social conditions, and the causes of crime are perceived to be rooted in individual failings rather than social explanations. Deviant behavior is viewed as individual choice, while social, economic, or structural explanations are ignored or deemed irrelevant.

Dowler, *supra* note 180, at 575; see also, e.g., L. Dorfman, K. Woodruff, V. Chavez & L. Wallack, Youth and Violence on Local Television News in California, 87 Am. J. Pub. Health 1311 (1997).

n195. Silence of the Lambs, *supra* note 85.

n196. For example, here is how Sarah Eschholz, Matthew Mallard, and Stacey Flynn described the language used in the shows they analyzed:

The "us" against "them" mentality pervading the programs often depicted the criminals as less than human, where any means necessary was appropriate for their capture. On "NYPD Blue," the terms "asshole," "dickhead," "deadbeat scumbag," "jerk," "skank," and "idiot" were all synonymous with suspect. Similarly, on "Law & Order," defendants were referred to as "dirt bags," "low lifes," "riff-raffs," "bitches," "bastards," "thugs," "faggots," and "freaks." An "NYPD Blue" detective once told a suspect during interrogation: "the fact is we don't want you to talk, you might express remorse and we want you to go into trial a picture of evil."

Eschholz, Mallard & Flynn, *supra* note 185, at 173.

n197. The term is not only the title of a 1964 movie (Thrill Killers, released by Morgan-Steckler Productions) and books—for example, Raymond Pingitore & Paul Lonardo's *Thrill Killers: A True Story of Innocence and Murder Without Conscience* (2008)—but also has been used by the press to refer to actual cases, or alleged patterns of cases. See, e.g., Bob Egelko, Death Sentence Upheld for Sacramento "Thrill Killer," S.F. Chron., May 17, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/C/a/2007/05/17/BAGA6PSSHM4.DTL>; Jim Atkinson, *Thrill Killers*, Tex. Monthly, Nov. 1996, available at <http://www.texasmonthly.com/preview/1996-11-01/feature4> ("All over urban Texas, young thugs are committing a vicious new kind of crime ..."); Bill Hewitt, *Thrill Killers?*, People Mag., June 9, 2003, available at <http://www.people.com/people/archive/article/0,,20140277,00.html>; A&E, *Investigative Reports: "Teen Thrill Killers,"* [http://www.aetv.com/listings/episode details.do?episodeid=166437](http://www.aetv.com/listings/episode%20details.do?episodeid=166437) (last visited Apr. 22, 2009).

n198. Scott Minerbrook, *A Generation of Stone Killers: What Makes Cold Blooded Kids Do What They Do*, U.S. News & World Rep., Jan. 17, 1995, at 33. Readers of this article were told that "the responses of the killers are chilling ... . And their malign ethos has metastasized to the suburbs." *Id.*

n199. This term is prevalent enough in the media to have spawned its own "top ten" lists and even its own games. See, e.g., Kim Morgan, *Psycho Killers: We Profile the Top 10 Murderers in Movie History*, MSN Movies, <http://movies.msn.com/movies/article.aspx?news=131100> (last visited Apr. 22, 2009); Purpose Games: Famous Cinema Psycho Killers, <http://www.purposegames.com/game/2635> (last visited Apr. 22, 2009).

n200. See Ford Fessenden, *Rampage Killers: They Threaten, Seethe and Unhinge, Then Kill in Quantity*, N.Y. Times, Apr. 9, 2000, at A1. The Times ran an entire four-part series on "rampage killers" beginning with a front page headline story and continuing over successive days. Despite acknowledging that the "attacks are rare when compared with other American murders"—indeed, "extremely rare, much less than 1 percent of all homicides"—the Times justified the unprecedented attention it gave the topic by suggesting that "rampage killers"—a term the newspaper itself may have coined—"have provoked intense national discussion about crime, education, and American culture" (indeed, discussion of precisely the sort that the Times series contributed mightily to). *Id.*; see also NYTimes.com, *Television, Rampage Killers: Looking for Signs*, <http://movies.nytimes.com/movie/249498/Investigative-Reports-Rampage-Killers-Looking-for-Signs/overview>

(last visited Apr. 22, 2009) (describing the television special as a "documentary that examines why our society is plagued by apparently random and unpredictable acts of mass murder"). *Id.*

n201. *Natural Born Killers* was a 1994 Oliver Stone movie supposedly intended to satirize the media's sensationalistic coverage of crime and criminals. However, the film's satiric qualities were undermined by an inability to clearly distinguish its own intended "over the top" coverage from what seemed like documentary footage—that is, a more or less accurate representation of how the media actually would cover such a case. Indeed, film critic Roger Ebert's review evaluated the movie less as satire than as an attempt to realistically portray criminality. Roger Ebert, *Natural Born Killers*, *Chi. Sun Times*, Aug. 26, 1994, available at <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19940826/REVIEWS/408260302/1023>. He did so, among other things, by noting what he perceived to be similarities between Stone's protagonists—Mickey and Mallory—and a real life defendant whose trial was being televised at approximately the same time—O.J. Simpson. *Id.* Thus, Ebert suggested that Stone had captured the same "odd emptiness" and "moral inattention" he had observed in Simpson during the latter's televised trial, observations that had troubled Ebert as he watched actual news coverage the case. *Id.* Ebert also praised the way in which the two main actors in *Natural Born Killers* were able to convey what he believed was an accurate image of criminality: "The casting is crucial: Woody Harrelson and Juliette Lewis are both capable of being frightening, both able to project amorality and disdain as easily as Jack Lemmon projects ingratiation." *Id.* However, Ebert also suggested, correctly, I believe, that when it comes to the way the media sensationalizes crime "it's almost impossible to satirize the situation--to get beyond real life." *Id.* New York Times film critic Janet Maslin touched on the same theme a bit differently, arguing that a number of actual, highly publicized cases "are spectacles that cast a long shadow," and that Stone's film "never digs deep enough to touch the madness of." She concluded that "Mr. Stone's vision is impassioned, alarming, visually inventive, characteristically overpowering. But it's no match for the awful truth." Janet Maslin, *Film Review: Natural Born Killers; Young Lovers With a Flaw That Proves Fatal*, *N.Y. Times*, Aug. 26, 1994, at C20.

n202. See Steve Jackson, *Monster* (1999); Douglas Preston, *The Monster of Florence: A True Story* (2008); Robert Mladnich, *From the Mouth of the Monster: The Joel Rifkin Story* (2002); Robert Ressler, *Whoever Fights Monsters: My Twenty Years Tracking Serial Killers for the FBI* (1993); Robert Ressler & Tom Shachtman, *I Have Lived in the Monster* (1997); Robert Scott, *Monster Slayer* (2005); Brandon Stickney, *All American Monster: The Unauthorized Biography of Timothy McVeigh* (1996); Carol Topolski, *Monster Love* (2008); Peter Vronsky, *Serial Killers: The Methods and Madness of Monsters* (2004); Peter Vronsky, *Female Serial Killers: How and Why Women Become Monsters* (2007); Aileen Wournos, *Monster: My True Story* (2006). There are other supposedly non-fiction works about notorious criminals whose titles emphasize the fundamental "otherness" of their subject. For example, see the works of Harold Schechter, whose "true crime" books include: *Bestial: The Savage Trail of a True American Monster* (1998); *Deviant: The Shocking True Story of Ed Gein, The Original Psycho* (1998); *Fiend: The Shocking True Story of America's Youngest Serial Killer* (2001); *Deranged: The Shocking True Story of America's Most Fiendish Killer* (2005). See also Ronald Markman & Dominick Bosco, *Alone With the Devil: Famous Cases of a Courtroom Psychiatrist* (1989). Book titles notwithstanding, the term "monster" is used in other mainstream media to refer to notorious criminals. For example, *Newsweek* headlined an article by Malcolm Jones as *The Man Who Sired a Monster*, reviewing a book by Jeffrey Dahmer's father who, as the reviewer put it, "craves to understand what made his son a monster"; the May 3, 1999 cover of *Time* carried the photos of the two boys who committed the Columbine killings, with the headline *The Monsters Next Door: What Made Them Do It?* See Malcolm Jones, *The Man Who Sired a Monster*, *Newsweek*, Mar. 7, 1994, at 67; *The Monster Next Door: What Made Them Do It?*, *Time*, May 3, 1999. Similarly, the cover of the November 4, 2005 *U.S. News & World Report* showed the faces of the so-called "DC Snipers" with the word "MONSTERS" emblazoned over their foreheads, and *People Magazine* headlined its story about the Scott Peterson case by quoting prosecutors' description of the defendant as a "monster." See *Monsters: Why They Did It How They Got Caught*, *U.S. News & World Rep.*, Nov. 4, 2005; Maria Lehner, *Prosecutors: Scott Peterson a "Monster," People*, Dec. 9, 2004, available at <http://www.people.com/people/article/0,,955863,00.html>. Newspaper headlines employ the term as well. See, e.g., Orin Yaniv & Alison Gendar, "Monster" Boyfriend Charged in Girl's Slaying, *N.Y. Daily News*, Apr. 8, 2008, at 14; Scott Schifrel, *Jury May Get to Hear From the Monster; Lawyer Mulls Letting Him Testify*, *N.Y.*

Daily News, Feb. 17, 2008, at 14; James Harper, Tattoo Abuse Monster Gets Death Penalty, BNET Business Network, June 25, 2006, available at [http://findarticles.com/p/articles/mi\\_qn4161/is\\_20060625/ai\\_n16504990](http://findarticles.com/p/articles/mi_qn4161/is_20060625/ai_n16504990).

n203. Edward Ingebreetsen, The Monster in the Home: True Crime and the Traffic in Body Parts, 21 J. Am. Culture 27 (2004).

n204. *Id.* at 29.

n205. For an example, see the dramatic cover and related inside story: Barbara Kantrowitz, Teen Violence: Wild in the Streets, Newsweek, Aug. 2, 1993, at 40; see also Paul Perrone & Meda Chesney-Lind, Representations of Gangs and Delinquency: Wild in the Streets, 24 Soc. Just. (1997),

n206. See, e.g., Glenn Garelik, Born Bad? New Research Points to a Biological Role in Criminality, Am. Health, Nov. 1993, at 66; Flora Johnson, With Malice Aforethought: A Recently Published Study Offers Persuasive Evidence That Criminals Are Born, Not Made, TWA Ambassador, Aug. 1979, at 79,

n207. See *supra* notes 202-206 and accompanying text. It is possible to easily access this kind of information at online news websites. See, e.g., Tom Lynch, Psycho Killers: A Rogue's Gallery of Chicago's Greatest Psychopaths, Newcity Chi., Oct. 23, 2003, available at <http://www.newcitychicago.com/chicago/2915.html>.

n208. See, e.g., Sharon Begley, In Search of the Roots of Evil, Newsweek, May 21, 2001, at 30; see also Benedict Carey, For the Worst of Us, the Diagnosis May Be "Evil," N.Y. Times, Feb. 8, 2005, at F1.

n209. Gixti, *supra* note 82, at 87.

n210. *Id.* at 88.

n211. Soulliere, *supra* note 188, at 32.

n212. *Brecheen v. Oklahoma*, 485 U.S. 909, 913 (1988). Justices Marshall and Brennan dissented from the Court's denial of certiorari in a capital case that involved a denied change of venue motion. Thus, the particular media bias in *Brecheen* resulted from case-specific pretrial publicity. Media criminology is in some ways more problematic and insidious because it forms a generic background of erroneous beliefs on which case-specific pretrial publicity often builds. Moreover, because media criminology is so pervasive, it comes to be regarded as "commonsense"--what everyone "knows" to be true. Thus, it is difficult to use *voir dire* in order to identify and eliminate those potential jurors who have been most affected (in part because they are themselves unaware that media criminology has produced bias, rather than expertise). For a discussion of the special challenges posed by the potent mix of general media misinformation and case-specific pretrial publicity, see Haney, *supra* note 8, at 216-22.

n213. Since the reinstatement of the death penalty in 1976, the constitutionality of a capital sentencing statute turns in part on whether it allows the jury to focus on the unique "characteristics of the person who committed the crime" and to consider whether there are "any special facts about this defendant that mitigate against imposing capital punishment." *Gregg v. Georgia*, 428 U.S. 153, 197 (1976).

n214. *Id.*

n215. Robin Mayer, *The ABA and the Supplementary Guidelines For the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 763, 768 (2008).

n216. Fabianic, *supra* note 188, at 201

n217. *Id.*

n218. Barbara Sims, *The Impact of Causal Attribution on Correctional Ideology: A National Study*, 28 Crim. Just. Rev. 1, 20 (2003).

n219. See, e.g., Mira Sotirovic, *How Individuals Explain Social Problems: The Influences of Media Use*, 53 J. Comm. 122 (2003).

n220. Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DePaul L. Rev. 1557, 1558 (2004).

n221. Racial minorities are less likely to support capital punishment. See, e.g., James Unnever & Francis Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 J. Res. Crime & Delinquency 124 (2007). Because death qualification excludes persons on the basis of their death penalty views, it results in the underrepresentation of minorities, especially African Americans, on capital juries. The racially targeted use of peremptory challenges can exacerbate this effect. See, e.g., David Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Const. L. 3 (2001).

n222. See Mary Beth Oliver's research suggesting that the stereotypes that pervade media criminology actually may be applied more readily and erroneously to African Americans than others. Mary Beth Oliver, *Caucasian Viewers' Memory of Black and White Criminal Suspects in the News*, 49 J. Comm. 46 (1999); Mary Beth Oliver & Dana Fonash, *Race and Crime in the News: Whites' Identification and Misidentification of Violent and Nonviolent Criminal Suspects*, 4 Media Psych. 137 (2002); Mary Beth Oliver, Ronald Jackson, Ndidi Moses & Celnisha Dangerfield, *The Face of Crime: Viewers' Memory of Race-Related Facial Features of Individuals Pictured in the News*, 54 J. Comm. 88 (2004).

n223. As Cavender and Deutsch note, for example, tensions between law enforcement characters "still occur but they are more like disagreements among friends or family members." Cavender & Deutsch, *supra* note 176, at 73. Indeed, they describe this approach as a "police family device," one they suggest "may resonate with the audience because it normalizes the characters who are like our own families, but it also circulates an image of the police as a moral authority." *Id.* For an early discussion of the way television crime drama juxtaposes the normality of law enforcement personnel and the deviance of perpetrators as a way of underscoring both extremes, see Haney & Manzolati, *supra* note 174.

n224. Of course, there are alternative approaches that the media could present. In fact, there is empirical evidence that persons who are only briefly exposed to these other more scientifically defensible perspectives can and do change their views of crime causation and crime control. See Renita Coleman & Esther Thorson, *The Effects of News Stories That Put Crime and Violence Into Context: Testing the Public Health Model of Reporting*, 7 J. Health Comm. 401 (2002).

n225. Dexter Character Guide: Dexter Morgan, <http://www.sho.com/site/dexter/characters.do> (last visited Apr. 22, 2009).

n226. Dexter Victim Files: Victim 0311, <http://www.sho.com/site/dexter/special/features.do> (last visited Apr. 22, 2009).

n227. Gina Bellafante, Ah, for a Simpler Time, When a Serial Killer Had No Moral Qualms, N.Y. Times, Sept. 27, 2008, at A31 (quoting Dexter Morgan).

n228. Id.

n229. Showtime, Dexter: Season 3 Trailer, <http://www.sho.com/site/video/brightcove/series/title.do?bcpid=1305238289&bclid=1699210804> (last visited Apr. 22, 2009).

n230. Bellafante, *supra* note 227, at A25.

n231. Not surprisingly, then, all forms of crime-related television viewing--crime drama, crime news, and police "reality" shows--appear to predict higher levels support for the death penalty. See, e.g., Lance Holbert, Dhavan Shah & Nojin Kwak, Fear, Authority, and Justice: Crime-Related TV Viewing and Endorsements of Capital Punishment and Gun Ownership, 81 *Journalism & Mass Comm. Q.* 343 (2004).